Docket for 04-1544

(18)

No. 04-1544
Title: Vickie Lynn Marshall, Petitioner
v.
E. Pierce Marshall
Docketed: May 19, 2005
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (02-56002, 02-56067)
Decision Date: December 30, 2004
Rehearing Denied: February 16, 2005
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
May 17 2005	Petition for a writ of certiorari filed. (Response due June 20, 2005)
May 27 2005	Order extending time to file response to petition to and including July 20, 2005.
Jul 13 2005	Order further extending time to file response to petition to and including August 3, 2005.
Aug 3 2005	Brief of respondent E. Pierce Marshall in opposition filed.
Aug 15 2005	Reply of petitioner Vickie Lynn Marshall filed.
Aug 17 2005	DISTRIBUTED for Conference of September 26, 2005.
Sep 27 2005	Petition GRANTED.
Nov 7 2005	Blanket consent for the filing of amicus briefs in support of either party received from counsel for the petitioner.
Nov 7 2005	Blanket consent for the filing of amicus briefs in support of either party received from counsel for the respondent.
Nov 10 2005	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including November 21, 2005.
Nov 10 2005	Extension of time within which to file respondent's brief on the merits to and including January 20, 2006.
Nov 16 2005	Brief amicus curiae of Heirs, Inc. filed. (Distributed)
Nov 18 2005	Brief amici curiae of Professor Richard Aaron, et al. filed.
Nov 21 2005	Brief amicus curiae of United States filed.
Nov 21 2005	Joint appendix filed.
Nov 21 2005	Brief of petitioner Vickie Lynn Marshall filed.
Nov 30 2005	SET FOR ARGUMENT on Tuesday, February 28, 2006.
Dec 1 2005	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Dec 9 2005	CIRCULATED.
Jan 11 2006	Record received from U.S.C.A. 9th Circuit. (1 envelope and 1 tape)
Jan 20 2006	Brief amicus curiae of National College of Probate Judges filed. (Distributed)
Jan 20 2006	Brief of respondent E. Pierce Marshall filed. (Distributed)
Jan 20 2006	Brief amicus curiae of Washington Legal Foundation filed. (Distributed)
Jan 20 2006	Brief amici curiae of Texas, et al. filed. (Distributed)
Jan 20 2006	Brief amici curiae of Professors of Law Ernest A. Young and Heather Elliot filed. (Distributed)
Jan 20 2006	Brief amicus curiae of Philanthropy Roundtable filed. (Distributed).

Jan 20 2006	Brief amicus curiae of Eric Yollick, Administrator of the Estate of Herbert Clinton Sisco filed. (Distributed)
Jan 20 2006	Brief amicus curiae of Bonnie Snavely filed. (Distributed)
Jan 23 2006	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Jan 27 2006	Application (05A697) to file petitioner's reply brief on the merits in excess of page limits, submitted to Justice Kennedy.
Jan 30 2006	Record received from U.S.D.C. for Central District of California. (26 boxes)
Jan 31 2006	Response from counsel for respondent filed.
Feb 6 2006	Additional record (Supplemental Excerpts) from G. Eric Brundstad, Jr., Counsel for respondent. (28 Volumes)
Feb 7 2006	Application (05A697) denied by Justice Kennedy.
Feb 20 2006	Reply of petitioner Vickie Lynn Marshall filed. (Distributed)
Feb 28 2006	Argued. For petitioner: Kent L. Richland, Los Angeles, Cal.; and Deanne E. Maynard, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for the United States, as amicus curiae.) For respondent: G. Eric Brunstad, Jr., Hartford, Conn.

(1)

Supreme Court, U.S.
FILED

No. _____

041544 MAY 17 2005

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In The

Supreme Court of the United States

VICKIE LYNN MARSHALL,

Petitioner,

v.

E. PIERCE MARSHALL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Markham v. Allen*, 326 U.S. 490, 494 (1946), this Court held that Congress did not confer on the federal courts jurisdiction to "probate a will or administer an estate." In the intervening sixty years, some federal circuits have hewn closely to *Markham*, while others have significantly expanded the scope of the so-called "probate exception," holding that it ousts otherwise proper federal jurisdiction even over claims between parties that are "ancillary" or "related" to probate. Here, the Court of Appeals aligned itself with circuits that have broadly applied the probate exception, holding that although bankruptcy jurisdiction over petitioner's claim was otherwise proper under 28 U.S.C. § 1334, that jurisdiction could not be exercised because petitioner's claim was "probate related."

These decisions represent an irreconcilable split among the circuits over the scope of the probate exception. Accordingly, the questions presented are:

1. What is the scope of the probate exception to federal jurisdiction?

2. Did Congress intend the probate exception to apply where a federal court is not asked to probate a will, administer an estate, or otherwise assume control of property in the custody of a state probate court?

3. Did Congress intend the probate exception to apply to cases arising under the Constitution, laws, or treaties of the United States (28 U.S.C. § 1331), including the Bankruptcy Code (28 U.S.C. § 1334), or is it limited to cases in which jurisdiction is based on diversity of citizenship?

4. Did Congress intend the probate exception to apply to cases arising out of trusts, or is it limited to cases involving wills?

PARTIES TO PROCEEDINGS BELOW

The parties to the proceedings below are Vickie Lynn Marshall and E. Pierce Marshall.

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PETITION FOR WRIT OF CERTIORARI

It has been sixty years since this Court last addressed the so-called "probate exception" to federal jurisdiction. *Markham v. Allen*, 326 U.S. 490 (1946) was the last of a long series of decisions in which the Court held that although Congress has not given the federal courts *in rem* jurisdiction to probate wills or administer decedents' estates, where federal jurisdiction is otherwise proper in actions *between parties*, it may be exercised even if the actions concern probate assets or issues.

Since *Markham*, many circuits have deviated from this Court's probate-exception jurisprudence. While three circuits have hewn closely to *Markham* and its predecessors, others, including the Ninth Circuit in the present case, have applied the probate exception much more broadly, holding that federal courts may not entertain even *inter partes* claims that are in some fashion "ancillary" or "related" to probate, or that state law assigns to probate courts. A multiplicity of tests have developed, leading to inconsistent and unpredictable results.

The alarm has been sounded by many commentators. *See, e.g.*, John F. Winkler, *The Probate Jurisdiction Of The Federal Courts*, 14 Prob. L.J. 77, 135 (1997) ("The 'probate exception' . . . imposes limits so vague that the actions or relief it bars cannot be ascertained. Many courts have relied on formulaic standards that mask the absence of any coherent analysis. Others have been driven to impose arbitrary rules. Still others have confessed that no specific rules of application can be identified."); Peter Nicolas, *Fighting the Probate Mafia: A Dissection Of The Probate Exception To Federal Court Jurisdiction*, 74 S. Cal. L. Rev. 1479, 1483 (2001) (decrying the widespread "confusion as to [the] scope" of the probate exception). The alarm also has been repeatedly sounded by the circuit courts themselves. *See, e.g., Golden v. Golden*, 382 F.3d 348, 358 (3d Cir. 2004)

("Various descriptions of the probate exception over the years often seem to substitute one opaque verbal formulation for another."); *Storm v. Storm*, 328 F.3d 941, 943 (7th Cir. 2003) ("[T]he precise contours of the probate exception have not been – nor really can be – clearly defined."); *Mangieri v. Mangieri*, 226 F.3d 1, 2 (1st Cir. 2000) ("'the precise scope of the probate exception has not been clearly established'") (quoting *Georges v. Glick*, 856 F.2d 971, 973 (7th Cir. 1988)); *Ashton v. Josephine Bay Paul & C. Michael Paul Found., Inc.*, 918 F.2d 1065, 1071 (2d Cir. 1990) ("The probate exception is 'one of the most mysterious and esoteric branches of the law of federal jurisdiction.'") (quoting *Dragan v. Miller*, 679 F.2d 712, 713 (7th Cir. 1982)); *Rice v. Rice Found.*, 610 F.2d 471, 475 (7th Cir. 1979) ("the probate exception is not easily applied to particular cases").

There thus can be little question that this Court's intervention is needed to clarify the scope of federal probate jurisdiction. The present opinion is a particularly appropriate candidate for this Court's review, for a number of reasons:

- The opinion deepens the uncertainty over the scope of the probate exception by expressly rejecting the approaches of at least five other circuits, in favor of the approach adopted by just one court. Appendix ("App.") at 26-27.
- The opinion takes the probate exception into uncharted waters by applying it to divest a federal court of the plenary bankruptcy jurisdiction conferred by Congress, expressly rejecting another circuit's holding that the probate exception does *not* apply to bankruptcy jurisdiction. App. at 24-26.
- The opinion permits a significant, nonstatutory encroachment on federal subject matter jurisdiction that lacks any discernable principles to guide judicial discretion.

- The opinion conflates *res judicata* and subject matter jurisdiction, an approach recently repudiated by this Court in *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. __, 125 S. Ct. 1517 (2005).
- The opinion interprets the probate exception expansively, applying it to an *inter partes* tort action that exists independently of the decedent's death, does not challenge the validity of decedent's testamentary documents, does not involve the administration of a probate estate and cannot affect any probate estate assets.

The confused state of the law on the scope of the probate exception has here permitted a federal court to reject jurisdiction over a properly-filed federal bankruptcy claim essentially because a related claim was pending in a state probate court. Earlier this term, this Court corrected a similar avoidance by a federal court of its obligation to hear a properly-filed federal case. In the context of the *Rooker-Feldman* doctrine, this Court cautioned federal courts against "overriding Congress' conferral of federal-court jurisdiction concurrent with jurisdiction exercised by state courts," and it stressed that "'the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction.'" *Exxon Mobil Corp.*, 125 S. Ct. at 1521, 1526-27 (quoting *McClellan v. Carland*, 217 U.S. 268, 282 (1910)). The probate exception must be clarified so as to prevent an equally significant surrender of federal jurisdiction functionally identical to that condemned in *Exxon Mobil*.

The long-brewing conflicts among the circuits and the questions surrounding the nature and scope of the probate exception make this issue more than ripe for this Court's resolution. This Court should take this opportunity to bring order to the chaos and grant certiorari.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 392 F.3d 1118. App. at 1-38. The opinions of the United States District Court for the Central District of California are reported at 275 B.R. 5 and 264 B.R. 609. App. at 39-188. The opinions of the United States Bankruptcy Court for the Central District of California are reported at 257 B.R. 35 and 253 B.R. 550. App. at 189-221.

JURISDICTION

The Court of Appeal issued its opinion on December 30, 2004. It denied rehearing and rehearing *en banc* on February 16, 2005. App. at 222.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Jurisdiction was proper in the district court and Court of Appeals pursuant to 28 U.S.C. §§ 1331 and 1334.

STATUTES INVOLVED

The text of 28 U.S.C. §§ 1331, 1332 and 1334 are set out in the Appendix to this Petition, at pages 223-226.

STATEMENT OF THE CASE

Shortly before his death, J. Howard Marshall II ("Howard") was one of the wealthiest men in Texas, with assets exceeding $1.6 billion. App. at 40, 149-50. When he died, his will and testamentary trust named his son, respondent E. Pierce Marshall ("Pierce"), as the sole beneficiary. App. at 55. Howard had attempted to provide for his wife, petitioner Vickie Lynn Marshall ("Vickie"), through a separate, *inter vivos* trust that would have supported her throughout her life. App. at 78-85, 133-36,

204-05, 215-17, 219-20. His efforts failed, however, because – as both lower courts found – Pierce suppressed or destroyed the trust instrument and stripped Howard of all his assets before his death. App. at 86-136, 202-07, 216-19.

After Howard died, Vickie filed for bankruptcy. App. at 41. Pierce filed a proof of claim for defamation in the bankruptcy action, and Vickie filed a mandatory counterclaim alleging, among other things, tortious interference with an *inter vivos* trust. App. at 42-43.

The bankruptcy court summarily resolved Pierce's defamation claim against him. App. at 43. It then tried Vickie's tortious interference claim, finding that Howard intended to create an *inter vivos* trust for Vickie, but that Pierce tortiously prevented it. App. at 202-07, 216-19. The Court also found that Pierce engaged in "massive discovery abuse," including destroying a substantial quantity of documents relevant to Vickie's claim. App. at 207-13. Accordingly, the court awarded Vickie compensatory damages of more than $449 million (the amount of the intended trust), plus punitive damages of $25 million. App. at 199, 221.

Meanwhile, Pierce offered Howard's will for probate in Texas. App. at 41. When Pierce's brother contested the will, Vickie joined. Years later, she filed a tortious interference claim against Pierce in the probate court. *Marshall v. Marshall (In re Marshall)*, 273 B.R. 822, 825-26 (Bankr. C.D. Cal. 2002).

After the bankruptcy court entered judgment for Vickie, she voluntarily dismissed her Texas claim. *Marshall v. Marshall (In re Marshall)*, 271 B.R. 858, 866 (C.D. Cal. 2001). Pierce then amended his pleadings to pursue additional claims against Vickie. *Marshall*, 273 B.R. at 826. After a trial, the probate court concluded that Howard's will was valid and admitted it to probate. App. at 5-6.

Pierce appealed the bankruptcy judgment to the district court. App. at 44. There, he urged dismissal for lack of subject matter jurisdiction pursuant to the so-called "probate exception." The court held the probate exception did not apply because the bankruptcy court "did not assert jurisdiction generally over the probate proceedings for J. Howard, Sr. or take control over the estate's assets," and because Texas law did not require that Vickie assert her claim in a probate court. App. at 158-70. The court then reviewed Vickie's claim *de novo*, independently concluding that Howard directed his lawyers to prepare an *inter vivos* trust for Vickie, but that Pierce suppressed or destroyed it. App. at 40, 46, 86-136. The court also found "overwhelming" evidence of Pierce's "willfulness, maliciousness, and fraud." App. at 145. Accordingly, it awarded Vickie compensatory damages of nearly $44.3 million, plus punitive damages of an additional $44.3 million. App. at 137-47.[1]

Pierce appealed to the United States Court of Appeals for the Ninth Circuit. The Court held the probate exception applied and, hence, there was no federal subject matter jurisdiction over Vickie's claim. App. at 1-38.

Vickie filed a timely petition for rehearing and rehearing *en banc*, which was denied February 16, 2005. App. at 222.

[1] Like the bankruptcy court, the district court found that Howard intended to give Vickie half the increase in the value of his assets from the date of their marriage. However, the district court valued the increase as of the date of Howard's death, while the bankruptcy court valued it as of the date of trial. Accordingly, the district court reduced Vickie's compensatory damages even though it found that "the facts are much more egregious than even the bankruptcy court suspected and found." App. at 144.

REASONS WHY CERTIORARI SHOULD BE GRANTED

I. THE PROBATE EXCEPTION, AS ARTICULATED BY THIS COURT, IS A NARROW, CONGRESSIONALLY-MANDATED LIMITATION ON FEDERAL PROBATE JURISDICTION.

A. This Court Has Repeatedly Held That There Is Federal Jurisdiction Over Probate-Related Actions *Between Parties*.

In decisions dating to the early nineteenth century, this Court has articulated what lower federal courts have termed the "probate exception" to federal jurisdiction. In these decisions, this Court held there is no federal jurisdiction to probate wills or administer decedents' estates. The exception is a narrow one, however: The Court consistently has held that if federal jurisdiction is otherwise proper,

> whenever a controversy in a suit *between . . . parties* arises respecting the validity or construction of a will, or the enforcement of a decree admitting it to probate, there is no more reason why the Federal courts should not take jurisdiction of the case than there is that they should not take jurisdiction of any other controversy between the parties.

Gaines v. Fuentes, 92 U.S. 10, 22 (1876). In other words,

> "A citizen of another State may establish a debt against the estate. But the debt thus established must take its place and share of the estate as administered by the probate court; and it cannot be enforced by process directly against the property of the decedent. In like manner a distributee, citizen of another State, may establish his right to a share in the estate, and enforce such adjudication against the administrator personally, or his sureties, or against any other parties

> subject to liability, or in any other way which does not disturb the possession of the property by the state court."

Waterman v. Canal-Louisiana Bank & Trust Co., 215 U.S. 33, 44 (1909) (quoting *Byers v. McAuley*, 149 U.S. 608, 620 (1893)) (citations omitted).

Thus, for example, in *Payne v. Hook*, 74 U.S. 425 (1868), this Court held that although a state probate action was then pending, there was federal jurisdiction over a plaintiff's suit to obtain her intestate share of her brother's estate. According to the Court, were it to conclude otherwise,

> an important part of the jurisdiction conferred on the Federal courts by the Constitution and laws of Congress, would be abrogated. As the citizen of one State has the constitutional right to sue a citizen of another State in the courts of the United States, instead of resorting to a state tribunal, of what value would that right be, if the court in which the suit is instituted could not proceed to judgment, and afford a suitable measure of redress?

Id. at 429-30.

Similarly, in *Waterman v. Canal-Louisiana Bank & Trust Co.*, 215 U.S. 33, this Court held there was federal jurisdiction over a claim that a charitable bequest in a decedent's will failed and, accordingly, plaintiff was entitled to part of the decedent's estate. The Court explained,

> This court has uniformly maintained the right of Federal courts of chancery to exercise original jurisdiction (the proper diversity of citizenship existing) in favor of creditors, legatees, and heirs, to establish their claims and have a proper execution of the trust as to them.

Id. at 43.

And, in *McClellan v. Carland*, 217 U.S. 268 (1910), the Court held there was federal jurisdiction to decide whether plaintiffs were "the sole heirs at law and next of kin of said decedent, and entitled to inherit the estate, real and personal." *Id.* at 275-76. The Court explained that the suit "was within the original jurisdiction of the circuit court of the United States" because "the chancery jurisdiction of the Federal courts to entertain suits between citizens of different states to determine interests in estates ... existed from the beginning of the Federal government." *Id.* at 281. Thus, the circuit court erred in staying the federal action until a state suit could be resolved:

> It ... appeared upon the record presented to the circuit court of appeals that the circuit court had practically abandoned its jurisdiction over a case of which it had cognizance, and turned the matter over for adjudication to the state court. This it has been steadily held, a Federal court may not do.

Id.[2]

The Court has given at least two explanations for the so-called probate exception. In *Gaines v. Fuentes*, the Court explained that a proceeding to probate a will is "one *in rem*, which does not necessarily involve any controversy between parties." 92 U.S. at 21. Thus, "the proceeding is not within the designation of cases at law or in equity *between parties of different States*, of which the Federal courts have concurrent jurisdiction with the State courts under the Judiciary Act." *Id.* at 22 (emphasis added).

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[2] *See also Byers v. McAuley*, 149 U.S. at 618-22 (where parties were citizens of different states, federal court had jurisdiction to determine validity of handwritten will and cousins' intestate succession rights); *Gaines v. Fuentes*, 92 U.S. 10 (federal court had jurisdiction over suit to restrain enforcement of probate decree against owners of property claimed by decedent's heir).

However, if a controversy arises between parties concerning the validity or construction of a will or the enforcement of a decree admitting it to probate, "there is no more reason why the Federal courts should not take jurisdiction of the case than there is that they should not take jurisdiction of any other controversy between the parties." *Id.*

In other cases, the Court has explained that because the Judiciary Act of 1789 gave federal courts jurisdiction over "suits of a civil nature *at common law or in equity*," 1 Stat. 73 (emphasis added), federal jurisdiction is coextensive with the jurisdiction of the English common law and chancery courts in 1789. *Markham*, 326 U.S. at 494. Since the probate of wills and the administration of decedents' estates were thought to be within the exclusive jurisdiction of England's ecclesiastical courts, federal jurisdiction did not include these matters. *Id.* at 494; *In re Broderick's Will*, 88 U.S. 503, 512 (1874). However, suits by heirs to establish their rights to probate estates were held to be outside the probate exception because, by the eighteenth century, English chancery courts routinely heard such suits. *Waterman*, 215 U.S. at 43.

B. *Markham v. Allen.*

This Court last addressed the probate exception in *Markham v. Allen*, 326 U.S. 490. *Markham* arose out of the death of a California resident who willed property to German citizens. The will was admitted to probate in state court, where decedent's American heirs claimed his entire estate because California law prevented German citizens from inheriting. *Id.* at 492. While the probate action was pending, the Alien Property Custodian, a federal officer, sued in federal court claiming he was entitled to the decedent's entire net estate. *Id.* The appellate court dismissed the action, holding that because the claim was within the probate court's jurisdiction, "'its

right to proceed to determine heirship cannot be interfered with by the federal court.'" *Id.* at 493.

This Court reversed. It held that although there is no federal jurisdiction "to probate a will or administer an estate," federal courts have jurisdiction over "suits 'in favor of creditors, legatees and heirs' and other claimants against a decedent's estate 'to establish their claims'" so long as they do not "interfere with the probate proceedings" or "assume general jurisdiction of the probate or control of the property in the custody of the state court." *Id.* at 494 (quoting *Waterman*, 215 U.S. at 43). The Court defined "interfer[ence] with the probate proceedings" narrowly, explaining that although a federal court may not "disturb or affect the possession of property in the custody of a state court," it *may* exercise jurisdiction

> to adjudicate rights in such property where the final judgment does not undertake to interfere with the state court's possession *save to the extent that the state court is bound by the judgment to recognize the right adjudicated by the federal court.*

Id. (emphasis added).

The Court held there was no improper interference with probate because, although the federal judgment awarded plaintiff decedent's *entire net estate*, it left "undisturbed the orderly administration of decedent's estate in the state probate court and decree[d] petitioner's right in the property to be distributed after its administration." *Id.* at 495. "This, as our authorities demonstrate, is not an exercise of probate jurisdiction or an interference with property in the possession or custody of a state court." *Id.*

Under *Markham*, thus, the probate exception is extremely narrow. It is violated only when a federal court probates a will or distributes estate assets, not when it merely adjudicates rights to those assets. Indeed, *Markham* teaches that the probate exception is *not* violated

when a federal court adjudicates a claim to estate assets, even if the claim is "against a decedent's estate," and even if a probate court will be "bound by the judgment to recognize the right adjudicated by the federal court." *Id.* at 494.

II. THE COURTS OF APPEAL ARE IRRECONCILABLY IN CONFLICT OVER THE REACH OF THE PROBATE EXCEPTION.

A. The Circuits Are In Conflict As To The Scope Of The Probate Exception.

In the nearly sixty years since *Markham*, the circuit courts have become profoundly split over the scope of the probate exception. The Second, Fifth and Eleventh Circuits (and the Ninth Circuit, before the present case) follow *Markham* and its antecedents closely, applying the probate exception only if a federal court is asked to probate a will or administer a decedent's estate. The Fourth, Sixth, Eighth and Tenth Circuits apply a broader rule, holding there is no federal jurisdiction over any claim that, under state law, would be adjudicated by a state probate court. The First, Third and Seventh Circuits apply a still-broader test, precluding jurisdiction over any claim that is in some fashion "ancillary" or "related" to probate. Finally, the Ninth Circuit in this case, as well as a single panel of the Second Circuit, have combined the two preceding tests to hold that the probate exception applies if a claim is in any manner "related to" probate *or* under state law would be adjudicated only in a probate court.

1. *Markham* test.

The Second, Fifth and Eleventh Circuits have closely followed *Markham* to hold that the probate exception applies only if a federal court is asked to probate a will,

administer a probate estate or "order actual transfer of property under probate." *Turton v. Turton*, 644 F.2d 344, 347 (5th Cir. 1981).[3] According to these courts, "Merely determining the rights to, as opposed to administering, assets is not proscribed by the probate exception." *Ashton v. Josephine Bay Paul and C. Michael Paul Foundation, Inc.*, 918 F.2d 1065, 1072 (2d Cir. 1990). Thus, while a federal court may not directly "distribut[e] . . . any assets" of a decedent's estate, it may adjudicate a party's "'right to share in the estate.'" *Dulce v. Dulce*, 233 F.3d 143, 148 (2d Cir. 2000). One court explained:

> The [probate exception] is easier to apply than to state. Under the heading of "establishing claims," for example, a creditor may obtain a federal judgment that he has a valid claim against the estate for one thousand dollars, or a devisee may obtain a declaratory judgment that a probated will entitles him to twenty percent of the net estate. What a federal court may not do, however, is to order payment of the creditor's thousand dollars, because that would be an assumption of control over property under probate. Similarly, the court may not find that the devisee's twenty percent share is worth $20,000, because it is the province of the probate court to determine the dollar amount of the net estate after liquidating assets and paying claims. Instead, the federal court is limited to declaring the validity of the asserted claims, leaving the claimants to assert

[3] Before the present opinion, the Ninth Circuit also followed *Markham* closely. *See Hilton v. Mumaw*, 522 F.2d 588 (9th Cir. 1975) (probate exception did not bar suit alleging that defendant fraudulently induced decedent to transfer assets out of his estate); *Blacker v. Thatcher*, 145 F.2d 255, 256-57 (9th Cir. 1944) (under this Court's "settled rule," there was federal jurisdiction to resolve dispute between parties over rights under decedent's will, notwithstanding pending state probate action).

> their federal judgments as *res judicata* in the probate court.

Turton, 644 F.2d at 347; *see also Robertson v. Robertson*, 803 F.2d 136, 139 (5th Cir. 1986) (probate exception does not apply where federal judgment "will not disturb the administration of the estate by the [state] court for it will result solely in a decree between the parties to the federal suit"); *Michigan Tech Fund v. Century Nat'l Bank*, 680 F.2d 736, 740 (11th Cir. 1982) ("The probate exception does not foreclose a creditor from obtaining a federal judgment that the creditor has a valid claim against the estate for a certain amount.").

Because under this formulation the probate exception turns on estate *administration*, not the subject matter of the dispute, these circuits have permitted broad federal adjudication of probate-related matters. For example, these circuits have held there is federal jurisdiction to interpret a will, *Michigan Tech Fund*, 680 F.2d at 740 ("will interpretation is within the diversity jurisdiction of the federal courts, and not within the probate exception"); to determine the validity of claims under state forced heirship laws, *Robertson*, 803 F.2d 136; and over a claim for breach of agreement to make a will, *Michigan Tech Fund*, 680 F.2d at 740-41. There also is federal jurisdiction to determine whether disputed assets are part of a decedent's estate, *Ashton*, 918 F.2d at 1071-72; *Michigan Tech Fund*, 680 F.2d at 740-43; whether a judgment is enforceable against a decedent's estate, *Dulce*, 233 F.2d 143; and over a breach of fiduciary duty claim against an executor, *Breaux v. Dilsaver*, 254 F.3d 533 (5th Cir. 2001).

2. State law test.

The Fourth, Sixth, Eighth and Tenth Circuits have held there is no federal jurisdiction over any suit that,

under state law, is within the exclusive jurisdiction of state probate courts. In these circuits:

> "The standard for determining whether federal jurisdiction may be exercised is whether under state law the dispute would be cognizable only by the probate court. If so, the parties will be relegated to that court; but where the suit merely seeks to enforce a claim *inter partes*, enforceable in a state court of general jurisdiction, federal diversity jurisdiction will be assumed."

Rienhardt v. Kelly, 164 F.3d 1296, 1300 (10th Cir. 1999) (emphasis omitted) (citing *McKibben v. Chubb*, 840 F.2d 1525, 1529 (10th Cir. 1988)).[4]

Because in these circuits federal jurisdiction depends on state law, the claims to which the probate exception applies vary greatly. Among the claims held barred are breach of fiduciary duty by an executor or trustee, *Bedo*, 767 F.2d 305; *Lepard*, 384 F.3d at 237; tortious interference, *id.*; *but see Rienhardt*, 164 F.3d at 1301; fraudulent inducement to make a will, *Sianis*, 294 F.2d 994; and undue influence, *Rienhardt*, 164 F.3d at 1300-01; *Turja*, 118 F.3d at 1008-10.

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[4] *See also Beren v. Ropfogel*, 24 F.3d 1226, 1228 (10th Cir. 1994) (same); *Lepard v. NBD Bank*, 384 F.3d 232, 237-38 (6th Cir. 2004) (same); *Turja v. Turja*, 118 F.3d 1006, 1009 (4th Cir. 1997) ("'The law is well settled that the federal courts have no jurisdiction over matters within the exclusive jurisdiction of state probate courts.'") (quoting *Foster v. Carlin*, 200 F.2d 943, 947 (4th Cir. 1952)); *Bedo v. McGuire*, 767 F.2d 305, 305-07 (6th Cir. 1985) (probate exception applied because "under the law of Ohio exclusive jurisdiction of probate matters . . . is vested in the Probate Court"); *Sianis v. Jensen*, 294 F.3d 994, 998 (8th Cir. 2002) (federal jurisdiction over claim that will is invalid "depends on the remedy available to [plaintiff] under [state] law").

3. "'Ancillary' to probate" test.

In the First, Third, and Seventh Circuits, the probate exception applies if a claim is in some fashion "ancillary to" probate. The factors relevant to determining whether this test applies vary; they include the following.

First Circuit: In the First Circuit, suits "'ancillary' to the probate of a will" are barred by the probate exception. Such suits include those "within the jurisdiction of the [probate court]" and those that "would require the district court to set aside the ruling of the probate court." *Mangieri v. Mangieri*, 226 F.3d 1, 2-3 (1st Cir. 2000).

Third Circuit: In the Third Circuit, the probate exception bars claims "'ancillary' to probate," including those that would "assail or contradict a judgment of the probate court" or "challenge management of the estate." However, there is federal jurisdiction over otherwise barred causes of action that "would be maintainable *inter partes* in the state courts of general jurisdiction." *Golden v. Golden*, 382 F.3d 348, 358 (3d Cir. 2004); *see also Moore v. Graybeal*, 843 F.2d 706 (3d Cir. 1988).

Seventh Circuit: In the Seventh Circuit, the probate exception bars claims "'ancillary' to . . . core probate activities." Such claims include those that, if "'maintained in federal court would impair the policies served by the [probate exception].'" Those policies are legal certainty ("ensur[ing] that the outcomes of probate disputes will be consistent by limiting . . . litigation to one court system"), judicial economy ("avoid[ing] the piecemeal or haphazard resolution of all matters surrounding the disposition of the decedent's wishes"), "relative expertness" (vesting jurisdiction in those courts with "greater familiarity with such legal issues"), and "avoid[ing] unnecessary interference with the state system of probate law." *Storm v. Storm*, 328 F.3d 941, 943-44 (7th Cir. 2003) (citing *Dragan v. Miller*,

679 F.2d 712, 714-16 (7th Cir. 1982)); *see also Georges v. Glick*, 856 F.2d 971, 973-74 (7th Cir. 1988).

Courts applying the "ancillary to probate" test have refused jurisdiction over a broad range of probate-related matters, including tortious interference with inheritance, *Storm*, 328 F.3d at 944-47; *Moore*, 843 F.2d 706; *Dragan*, 679 F.2d at 715-17; *but see Golden*, 382 F.3d 348 (claim for tortious interference with inheritance held *not* barred by the probate exception); and breach of fiduciary duty by an executor, *Mangieri*, 226 F.3d 1; *Golden*, 382 F.3d at 361-62.

4. Hybrid test.

The Ninth Circuit in the instant matter, following the approach of a single panel of the Second Circuit, *see Moser v. Pollin*, 294 F.3d 335, 340 (2d Cir. 2002), adopted the broadest definition of the probate exception by combining the "'ancillary' to probate" and "state law" tests. App. at 27-28. Under this hybrid test, the court held the probate exception applies if a claim is "probate related" *or* under state law is within the exclusive jurisdiction of a probate court. App. at 28, 34. A claim is "probate related" if it raises any question "which would ordinarily be decided by a probate court in determining the validity of the decedent's estate planning instrument." App. at 28-29. Included in this expansive definition are "*all claims* regarding distribution of" decedent's assets, including "'what [the decedent] had and what he did with it and whether that was proper or improper.'" App. at 30 (emphasis added).

The extraordinarily broad sweep of the hybrid test is starkly illustrated by the present case. Here, Vickie's cause of action for tortious interference was against Pierce individually and made no claim against her husband's probate estate or testamentary trust, App. at 166; thus, it could have had no effect on estate administration. Vickie's

claim also did not implicate her husband's testamentary intent, but rather his donative intent during his lifetime. *Marshall*, 271 B.R. at 867. Nor did her claim challenge the validity of his will or testamentary trust; to the contrary, it assumed those documents were valid. App. at 28, 166-67.[5] Instead, Vickie claimed – and the district court found – that her husband intended to create a *separate inter vivos* trust for her benefit, but that Pierce tortiously prevented him from doing so. App. at 132-37. Had the trust survived, it would have existed independently of, and had no effect on the validity of, the testamentary documents before the probate court. Moreover, because Vickie would have become the beneficial owner of the trust *during Howard's lifetime*, *Marshall*, 271 B.R. at 867, her claim against Pierce existed while Howard was still alive. Finally, Vickie's claim did not depend on Pierce receiving Howard's assets – her claim would have existed even if his wealth had been transferred to someone else.

Thus, under the rule articulated by the Ninth Circuit, the probate exception could apply to *any* claim related to assets held by a decedent before or at his death, regardless of the nature of the claim or the claim's utter lack of impact on probate administration.

[5] Though the district court examined evidence of the suspicious circumstances surrounding the execution of the testamentary trust, Vickie's claim does not rest upon the assertion that the will or testamentary trust are invalid. According to the court, "Although there is evidence that J. Howard's Living Trust was forged or tampered with, that is only some evidence of Pierce's tortious interference, and evidence to negate Pierce's contention that J. Howard had no donative intent." June 12, 2002 Order Den. Counter-Defendant's Mot. To Stay J. Pending Appeal, U.S.D.C. Docket No. 442, p. 4 n.2.

B. The Circuits Are In Conflict As To Whether The Probate Exception Applies To Federal Question Cases.

This Court has never directly addressed whether the probate exception applies to federal question cases generally or to bankruptcy cases specifically.[6] The Eleventh Circuit has twice considered the issue, holding that the probate exception does *not* apply to federal question cases. In *Glickstein v. Sun Bank/Miami*, 922 F.2d 666, 672 n.13 (11th Cir. 1991), the Court held that "the probate exception is an exception to diversity jurisdiction and has no application to the federal RICO claims." The Court similarly held in *Goerg v. Parungao (In re Goerg)*, 844 F.2d 1562, 1565 (11th Cir. 1988):

> Care should be taken not to confuse the question of the breadth of Congress' bankruptcy power with the so-called "probate exception" to statutory diversity jurisdiction. That exception related only to 28 U.S.C. § 1332 (1982), and has

[6] The opinion below erroneously asserts that this Court twice has held that the probate exception applies to federal question cases. App. at 26. It has not. In *Harris v. Zion's Savings Bank & Trust Co.*, 317 U.S. 447 (1943), the only question before the Court was one of statutory construction – whether Congress intended to confer powers on an estate administrator that state law expressly forbade. The Court referred to the limitation on federal probate jurisdiction in construing the relevant statute, but it did not hold that the federal courts lacked jurisdiction under the probate exception. *Id.* at 450-52. Indeed, had it so concluded, it would have dismissed for want of jurisdiction and, thus, it would not have had occasion to reach the statutory question. *Markham v. Allen* also did not address this issue because it had no reason to do so; although *Markham* concerned issues of federal law, this Court held that the probate exception did not apply for other reasons, and therefore had no occasion to discuss whether the probate exception applies to federal question cases generally.

no bearing on federal question jurisdiction, the jurisdiction invoked in bankruptcy cases.[7]

The present opinion "specifically reject[s]" the Eleventh Circuit's analysis, holding that the probate exception applies to federal question cases, including bankruptcy cases. App. at 26.[8] The Court offers no real doctrinal explanation for its conclusion, stating only that the "'evil'" of "federal interference with state probate proceedings" "is as relevant to federal question cases as it is to diversity ones." *Id.*[9]

[7] Contrary to the Ninth Circuit's characterization, App. at 25, the quoted language in *Goerg* is not *dicta*. The issue there was whether a bankruptcy court had the power to grant a foreign trustee's petition for ancillary administration. The Eleventh Circuit held that the bankruptcy court had such power – a conclusion it could not reach without first concluding that federal jurisdiction was not ousted by the probate exception. *Goerg*, 844 F.2d at 1564-68.

[8] The district courts are similarly split. *See, e.g., Community Ins. Co. v. Rowe*, 85 F. Supp. 2d 800, 806 (S.D. Ohio 1999) (probate exception did not apply to ERISA claim because it "has been applied only in the context of diversity jurisdiction"); *Williams v. Adkinson*, 792 F. Supp. 755, 761 n.9 (M.D. Ala. 1992) ("Where, as here, the plaintiff does not predicate federal jurisdiction on diversity among the parties, the probate exception is not relevant."); *Powell v. American Bank & Trust Co.*, 640 F. Supp. 1568, 1574-75 (N.D. Ind. 1986) ("probate exception applies to diversity jurisdiction; there is nothing to suggest that a federal court cannot take jurisdiction over a federal question raised by a plaintiff"); *but see In re Estate of Threefoot*, 316 F. Supp. 2d 636, 642 (W.D. Tenn. 2004) ("probate exception is not limited to diversity cases"); *In re Estate of Lewis*, 128 F. Supp. 2d 573, 574 & n.3 (N.D. Ill. 2001) (same).

[9] The Eighth Circuit Bankruptcy Appellate Panel has also recently applied the probate exception to a bankruptcy matter, similarly without any analysis of why the probate exception applies in a non-diversity context. *Litzinger v. Estate of Litzinger (In re Litzinger)*, 322 B.R. 108 (B.A.P. 8th Cir. 2005).

C. This Court Should Clarify The Scope Of The Probate Exception.

Only this Court can resolve the conflicts among the circuits and authoritatively explicate the scope of the probate limitation on federal jurisdiction. Without such clarification, parties and courts will continue, as here, to spend years litigating the merits of such matters, only to learn at the end of the appellate process that the lower court never had jurisdiction to act.[10]

III. THE NINTH CIRCUIT'S EXPANSIVE INTERPRETATION OF THE PROBATE EXCEPTION PERMITS AN UNWARRANTED AND UNBOUNDED INTRUSION ON FEDERAL JURISDICTION THAT HAS NO STATUTORY BASIS.

A. The Ninth Circuit's Approach Is Unmoored To The Congressional Grant Of Federal Jurisdiction And Contravenes The Bankruptcy Code.

As discussed above, under this Court's opinions, there is no federal jurisdiction to probate a will or administer a decedent's estate because "the equity jurisdiction *conferred*

[10] The present case illustrates how costly the absence of clear rules can be. Before being reversed by the Ninth Circuit, both the bankruptcy and the district courts carefully considered the scope of their jurisdiction and concluded that the probate exception did not apply. Thus, they twice tried the merits of petitioner's tortious interference claim and awarded multi-million dollar judgments. The two trials and appeal of that claim took over nine years to resolve and resulted in "one of the most extensive records ever produced in the Central District of California." App. at 23.

Moreover, because Vickie dismissed her tortious interference claim in Texas after prevailing in federal court, if the federal judgment is not reinstated, she could forfeit her claim entirely.

by the Judiciary Act of 1789, 1 Stat. 73, and § 24(1) of the Judicial Code . . . did not extend to probate matters." *Markham*, 326 U.S. at 494 (emphasis added). As applied by this Court, thus, the probate exception is firmly grounded in Congress's grant of jurisdiction to the federal courts – it is not a judicially-crafted exception to it.

In contrast, the Ninth Circuit's application of the probate exception neither mentions the applicable statutes nor purports to interpret them. *Nowhere* in its lengthy opinion does the Ninth Circuit cite or discuss the historical basis of the probate exception or the statutory grant of federal question jurisdiction (28 U.S.C. § 1331) to the federal courts. Nor does it discuss the statutory grant of bankruptcy jurisdiction (28 U.S.C. § 1334) or any provision of the Bankruptcy Code. To the Ninth Circuit, no such discussion is necessary because it sees the probate exception as a judicially-crafted doctrine that exists separate from any statutory source.

But such an approach co-opts power that the Constitution gives to Congress: "Only Congress may determine a lower federal court's subject-matter jurisdiction." *Kontrick v. Ryan*, 540 U.S. 443, 452 (2004) (citing U.S. Const., Art. III, § 1). While courts may interpret the statutes that grant federal jurisdiction, they may not carve out exceptions to them. The Ninth Circuit violates this tenet, effectively creating a jurisdictional exception that has no statutory foundation and, thus, no limiting principles.

The absence of limiting principles is what allows the extravagance of the Ninth Circuit's extension of the probate exception. The opinion variously (and inconsistently) places the present case within the probate exception because the case raises "questions which would ordinarily be decided by the probate court in determining the validity of the decedent's estate planning documents" (App. at 29); invites findings of fact "in direct and irreconcilable conflict with

the Texas probate court's judgment" (App. at 30); "interfere[s] with the Texas probate court proceedings" (App. at 31); is "'nothing more than a thinly veiled will contest" (*id.*); and "negated . . . the power of the Texas probate court" (App. at 32). It thus provides no real guidance in future cases and permits federal judges virtually unbounded discretion in determining whether federal jurisdiction exists.

The opinion also presents a particular threat to bankruptcy jurisdiction that does not stop at the specifics of this case. The court held here that where probate and bankruptcy courts share an interest in the same assets – the probate court, for distribution to heirs; the bankruptcy court, for distribution to creditors – the bankruptcy court must defer to the probate court's adjudication. But the plain language of the Bankruptcy Code provides otherwise. Pursuant to its constitutionally-based plenary power over bankruptcy, Congress has given federal courts exclusive jurisdiction of all cases under the Bankruptcy Code, and "original but not exclusive jurisdiction of all civil proceedings arising under [the Bankruptcy Code], or arising in or related to cases under [the Bankruptcy Code]." 28 U.S.C. § 1334 (a)-(b). Exclusive federal jurisdiction extends to "all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate." 28 U.S.C. § 1334(e). Congress has also provided for an automatic stay of other litigation affecting the bankrupt or the bankruptcy estate, 11 U.S.C. § 362; *Citizens Bank v. Strumpf*, 516 U.S. 16, 21 (1995), and it has given federal courts sitting in bankruptcy the power to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of" the Bankruptcy Code, 11 U.S.C. § 105(a).

Congress has also specifically provided for continuing federal bankruptcy jurisdiction even when a party's death leads to the creation of a probate estate with an interest in

bankruptcy estate assets. For example, pursuant to express bankruptcy rule, the death of a Chapter 7 debtor "shall not abate" the bankruptcy action; "[i]n such event the estate shall be administered and the case concluded in the same manner, so far as possible, as though the [death] had not occurred." Bankr. R. 1016; *see also In re Gridley*, 131 B.R. 447, 449-51 (D.S.D. 1991). Thus, "the bankruptcy proceeding will continue in rem with respect to property of the [bankruptcy estate]," and "only property exempted from property of the [bankruptcy] estate or acquired by the debtor after the commencement of the case and not included as property of the [bankruptcy] estate will be available to the representative of the debtor's probate estate." H.R. Rep. No. 595, 95th Cong., 1st Sess. 367-68 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 82-83 (1978), *quoted in* Alan N. Resnick, et al., Collier On Bankruptcy 1016.02 & n.12 (15th ed. 2004); *In re Gridley*, 131 B.R. at 450. The Bankruptcy Code thus expressly provides for federal court jurisdiction over assets relevant to both bankruptcy and probate proceedings.

Under the Bankruptcy Code, thus, it is the *federal bankruptcy court*, not the state court, that controls the adjudication of disputes common to bankruptcy and other forums. The Ninth Circuit's approach has exactly the opposite effect: It permits only *probate courts* to exercise exclusive jurisdiction over assets common to bankruptcy and probate estates.

B. The Ninth Circuit's Approach Misunderstands Equity's Historic Role In Adjudicating Trust Matters.

The Ninth Circuit's opinion holds that although Vickie claimed interference with a trust, not a will, there was no federal jurisdiction because "[t]he probate exception

applies not only to contested wills, but also to trusts that direct a post mortem disposition of the trustor's property." App. at 33.[11] This analysis fundamentally misunderstands the historic role of courts of equity in trust matters.

As noted above, this Court has traced the probate exception's origin to the Judiciary Act of 1789, which granted the lower federal courts jurisdiction over "all suits of a civil nature *at common law or in equity*. . . . " Because the probate of wills and administration of decedents' estates were thought to be ecclesiastical matters, not matters for the common law or equity courts, federal jurisdiction was held not to include them. *Id. Trusts*, however, were on an entirely different footing. "[A]t common law, the courts of equity had *exclusive* jurisdiction over virtually all actions by beneficiaries for breach of trust." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1993) (emphasis added) (citing *Lessee of Smith v. McCann*, 65 U.S. 398, 407 (1861)); *Waterman*, 215 U.S. at 43 ("This court has uniformly maintained the right of Federal courts of chancery to exercise original jurisdiction . . . in favor of creditors, legatees, and heirs, to establish their claims and have a proper execution of the trust as to them."); *Payne v. Hook*, 74 U.S. at 431 ("It is . . . well settled that a court of chancery, *as an incident to its power to enforce trusts* . . . has jurisdiction to compel executors and administrators to account and distribute the assets in their hands.") (emphasis added); *see also* Peter Nicolas, *Fighting the Probate Mafia: A Dissection of the Probate Exception to Federal*

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[11] Other courts have similarly held. *See, e.g., Storm v. Storm*, 328 F.3d at 947 (probate exception applies "despite this being a dispute over the terms of an *inter vivos* trust rather than a traditional will"); *Golden v. Golden*, 382 F.3d at 359 (probate exception applies to "trusts that act as 'will substitutes' "); *Sianis v. Jensen*, 294 F.3d at 999 ("Other courts, including our own, have recognized that there might be instances when the probate exception applies in diversity actions involving trusts").

Court Jurisdiction, 74 S. Cal. L. Rev. at 1513-14 & n.202, 203 ("In eighteenth century England, the entire system of trust was within the exclusive jurisdiction of chancery, and chancery would thus never refuse to adjudicate matters relating to trusts."); F.W. Maitland, Equity 23 (1932) ("Of all the exploits of Equity the largest and most important is the invention and development of the Trust.").

In the present case, Vickie's action was for interference with an *inter vivos trust*, not a will. Her claim, thus, was within the historic equity jurisdiction of the federal courts, and it should not have been held excluded by the probate exception.

C. The Ninth Circuit's Approach Fundamentally Misconstrues *Markham*'s "Interference" Analysis.

A significant concern driving the Ninth Circuit's probate exception analysis is avoiding "'[t]he evil . . . [of] federal interference with state probate proceedings.'" App. at 26; *see also* App. at 31 ("it is clear that the exercise of federal jurisdiction would and, in this case, did *interfere* with the Texas probate court proceedings"). According to the opinion, impermissible interference occurs when a federal court adjudicates issues that "would ordinarily be decided by a probate court in determining the validity of the decedent's estate planning instrument." Thus, in the Ninth Circuit's analysis, the probate exception is invoked – and hence federal jurisdiction eviscerated – when a federal court is asked to adjudicate an issue over which a probate court also has jurisdiction.

The ostensible root of the Ninth Circuit's "interference" analysis is *Markham v. Allen*, in which this Court held that a federal court may entertain a suit "'in favor of creditors, legatees and heirs'" as long as it does not "interfere" with the probate proceedings. 326 U.S. at 494. The

"interference" *Markham* cautioned against, however, expressly was *not* federal adjudication of an issue pending before a probate court. To the contrary, *Markham* held that a federal court *may* adjudicate an issue common to state and federal proceedings, even where a federal judgment will bind the state court. *Id.* (federal court may "adjudicate rights in [decedent's] property where the final judgment does not undertake to interfere with the state court's possession *save to the extent that the state court is bound by the judgment to recognize the right adjudicated by the federal court*") (emphasis added). Thus, while the Ninth Circuit's opinion adopts the language of *Markham*, its analysis is fundamentally inconsistent with it.

D. The Ninth Circuit's Approach Rejects The Well-Established Concept Of Parallel State And Federal Jurisdiction And Improperly Imports Preclusion Principles Into Its Jurisdictional Analysis.

The Ninth Circuit also held that there is improper interference with a probate proceeding – and hence no federal jurisdiction – if a probate claimant is given "a second chance to litigate her claim against the estate," thus "negat[ing] . . . the power of the . . . probate court." App. at 29, 32-33. By so holding, the Ninth Circuit made the very same error – improperly eschewing federal jurisdiction by conflating *res judicata* and jurisdiction – that this Court recently disapproved in *Exxon Mobil Corp. v. Saudi Basic Indus., Corp.*, 544 U.S. __, 125 S. Ct. 1517 (2005).

In *Exxon*, the Court rejected an approach to the *Rooker-Feldman* doctrine that held that where the same issues are concurrently before state and federal courts, federal jurisdiction terminates upon entry of a state court judgment. The Court explained that while "[c]omity or

abstention doctrines may, in various circumstances, permit or require the federal court to stay or dismiss the federal action in favor of the state-court litigation," properly invoked concurrent jurisdiction does not "vanish[] if a state court reaches judgment on the same or related question while the case remains *sub judice* in a federal court." *Id.* at 1527. The Court explained:

> Disposition of the federal action, once the state-court adjudication is complete, would be governed by preclusion law. . . . *Preclusion, of course, is not a jurisdictional matter*. In parallel litigation, a federal court may be bound to recognize the claim – and issue – preclusive effects of a state court judgment, but federal jurisdiction over an action does not terminate automatically on the entry of judgment in the state court.

Id. (emphasis added) (citation omitted).

The Court emphasized, moreover, that the federal statutory scheme permits concurrent state and federal adjudication of claims and, thus, that "'the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction.'" *Id.* at 1526-27 (quoting *McClellan v. Carland*, 217 U.S. 268, 282 (1910)).[12] Accordingly, the Court cautioned against an expansion of *Rooker-Feldman* that would "overrid[e] Congress' conferral of federal-court jurisdiction concurrent with jurisdiction exercised by state courts." *Id.* at 1521.

A similar analysis should govern in the present context. Contrary to what the Ninth Circuit held, because a pending state court action "'is no bar to proceedings concerning the same matter in the Federal court,'" *id.* at

[12] Significantly, *McClellan v. Carland* is a probate exception case, in which this Court held that federal jurisdiction was properly exercised over a probate-related matter.

1526-27, the fact that an issue before the federal court could be decided by a state probate court should be irrelevant if federal jurisdiction is otherwise proper. A prior state court judgment also should be irrelevant to the jurisdictional analysis; while a prior judgment may have preclusive effect, federal jurisdiction nonetheless exists because "[p]reclusion . . . is not a jurisdictional matter." *Id.* at 1527.

E. The Ninth Circuit's Approach Improperly Imports State Law Into Its Jurisdictional Analysis.

Under the second prong of the Ninth Circuit's hybrid test, there is no federal jurisdiction if "[the] state's trial courts of general jurisdiction do not have jurisdiction to hear probate matters." App. at 34. This approach runs counter to this Court's repeated admonition that because federal jurisdiction is created by federal statute, it is unaffected by state law.[13] According to *Payne v. Hook*, 74 U.S. 425, 430 (1868):

> We have repeatedly held "that the jurisdiction of the courts of the United States over controversies between citizens of different States, cannot be impaired by the laws of the States, which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power."

The Court similarly held in *Waterman v. Canal-Louisiana Bank & Trust Co.*, 215 U.S. 33, 43 (1909) (emphasis added):

[13] The error was compounded in this case because the Ninth Circuit did not independently analyze Texas law, but instead held, without doing a preclusion analysis, that it was bound by the probate court's erroneous conclusion that it had exclusive jurisdiction over Vickie's claim. App. at 34; *compare* App. at 165-70.

> [I]nasmuch as the jurisdiction of the courts of the United States is derived from the Federal Constitution and statutes, that in so far as controversies between citizens of different States arise which are within the established equity jurisdiction of the Federal courts . . . the jurisdiction may be exercised, *and is not subject to limitations or restraint by state legislation establishing courts of probate and giving them jurisdiction over similar matters.*

See also Hayes v. Pratt, 147 U.S. 557, 570 (1893) (state probate statutes cannot "defeat or impair the general equity jurisdiction of the Circuit Court of the United States to administer, as between citizens of different states, the assets of a deceased person within its jurisdiction"); *Green's Adm'x v. Creighton*, 64 U.S. 90, 107-08 (1860) ("a foreign creditor may establish his debt in the courts of the United States against the representatives of a decedent, notwithstanding the local laws relative to the administration and settlement of insolvent estates").

Accordingly, the Ninth Circuit erred in making federal jurisdiction depend on whether a probate court determines that it has exclusive jurisdiction over a petitioner's claim under state law.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the petition for writ of certiorari should be granted.

Respectfully submitted,

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392 F.3d 1118

United States Court of Appeals,
Ninth Circuit.

In re: Vickie Lynn MARSHALL, Debtor.
E. Pierce Marshall,
Plaintiff-Counter-Defendant/
Appellant-Cross-Appellee,
v.
Vickie Lynn Marshall,
Defendant-Counter-Claimant/
Appellee-Cross-Appellant.
Nos. 02-56002, 02-56067.

Argued and Submitted Oct. 9, 2003.
Filed Dec. 30, 2004.

G. Eric Brunstad, Jr., Bingham McCutchen, Hartford, CT, for the plaintiff-counter-defendant/appellant-cross-appellee.

Sheila S. Kato and Kent L. Richland, Greines, Martin, Stein & Richland, Los Angeles, CA, for the defendant-counter-claimant/appellee-cross-appellant.

Appeal from the United States District Court for the Central District of California; David O. Carter, District Judge, Presiding. D.C. No. CV-01-00097-DOC.

Before: BEEZER, KLEINFELD, and PAEZ, Circuit Judges.

BEEZER, Circuit Judge.

This appeal involves disputed claims made by Vickie Lynn Marshall, the surviving spouse of J. Howard Marshall II, against E. Pierce Marshall, the decedent's surviving son, the trustee of decedent's trust property and the executor of the estate of J. Howard Marshall II, deceased.

The surviving spouse alleges that E. Pierce Marshall tortiously interfered with an expected inter vivos gift from the decedent. Three courts – the Texas probate court, the U.S. bankruptcy court and the U.S. district court – have rendered conflicting judgments that decide the claims of the surviving spouse and that affect the distribution of the net property of the decedent's trust and probate estate.

While active probate proceedings were pending in the courts of the State of Texas, the surviving spouse filed personal bankruptcy proceedings in California. The resulting bankruptcy court proceedings and subsequent appeals to the district court resulted in the district court awarding a money judgment to Vickie Lynn Marshall for intentional interference with an inter vivos gift that she expected from the decedent. E. Pierce Marshall filed a timely appeal from the district court's money judgment. In a cross-appeal the surviving spouse seeks to reverse the district court's determination that the bankruptcy proceeding was not a core proceeding. She also attacks the amount of the damage award entered by the district court, which reduced the sum she was awarded by the bankruptcy court.

Our jurisdiction on the merits depends upon whether the probate exception to federal court jurisdiction applies to the claims initiated in the Texas probate court between the contesting claimants to the decedent's property. Incidentally we are required to determine whether the probate exception applies in a bankruptcy case.

We have appellate jurisdiction. 28 U.S.C. § 1291. We hold that all federal courts, including bankruptcy courts, are bound by the probate exception to federal court jurisdiction and that we are required to refrain from deciding

state law probate matters, no matter how the issue is framed by the parties. We vacate the district court's final judgment and remand with instructions.

I

During his lifetime and commencing in 1982, J. Howard Marshall II conveyed and transferred most of his property under the terms and provisions of a written revocable inter vivos trust. When J. Howard Marshall II created the trust, he resided in Texas. E. Pierce Marshall and J. Howard Marshall II were initially named as co-trustees of the 1982 trust. The trust instrument expressly provided for the disposition of J. Howard Marshall II's trust property upon his death. During his lifetime, J. Howard Marshall II retained the right to receive income from the trust estate, and the trust assumed the obligation to pay the debts of J. Howard Marshall II.

In addition to property and income held in trust, J. Howard Marshall II received income and held property solely in his own name. The second wife of J. Howard Marshall II died in 1991. E. Pierce Marshall then became the primary beneficiary of the trust upon the death of J. Howard Marshall II. To a lesser extent various charities and family beneficiaries received minor trust distributions upon the death of J. Howard Marshall II.

J. Howard Marshall II met Vickie Lynn Smith in 1991. They were married on June 27, 1994. J. Howard Marshall II gave Vickie Lynn Marshall numerous inter vivos gifts of cash and personal property during his lifetime. J. Howard Marshall II did not execute any written trust, trust modification, last will and testament or conveyance in which Vickie Lynn Marshall is identified as a

legatee, devisee or beneficiary, with one exception. In 1994, J. Howard Marshall II conveyed certain particularly described real property as a gift to Vickie Lynn Marshall in a separate conveyance. There is no evidence that J. Howard Marshall II authorized Vickie Lynn Marshall to participate in any capacity whatsoever with respect to Marshall business interests. There is also no evidence in the record that Vickie Lynn Marshall was a registered owner of any securities issued by Marshall corporations engaged in the petroleum industry.

J. Howard Marshall II frequently consulted his attorneys about gift taxes, estate taxes, and trust and estate matters. He considered and rejected several suggestions made by his attorneys regarding estate plans and the transfer of property to Vickie Lynn Marshall. One of J. Howard Marshall II's tax and estate attorneys drafted a letter to another of J. Howard Marshall II's attorneys with several ideas regarding provisions for Vickie Lynn Marshall. Specifically, the correspondence recommended the creation of a "catch-all" trust for the benefit of Vickie Lynn Marshall. This letter was the source of her claim that J. Howard Marshall II intended to give her an inter vivos or post mortem gift. Although it is disputed whether this proposed catch-all trust was ever created, it is admitted that J. Howard Marshall II never delivered any property in trust for the use and benefit of Vickie Lynn Marshall. No such signed trust instrument was ever produced for admission in evidence.

J. Howard Marshall II executed his last will and testament on December 22, 1992. This will contained pour-over provisions, which required the distribution of the decedent's probate property to the trustee of the 1982 trust.

The terms of the 1982 trust were modified for the last time on July 13, 1994. Although J. Howard Marshall II was married to Vickie Lynn Marshall, no provision for distributions of income or principal of the trust estate was made in favor of the settlor's spouse. The trust remained responsible for J. Howard Marshall II's debts and permitted him to borrow money using the trust's property as security.

It is contended by E. Pierce Marshall that J. Howard Marshall II made the trust provisions irrevocable as of July 13, 1994, subject to the limited power to make specified changes, such as adding a charity as a beneficiary or substituting one beneficiary for another, as long as the beneficiary that was being substituted was already a current beneficiary. After the amendment, J. Howard Marshall II could have eliminated his son, E. Pierce Marshall, as a beneficiary of the trust by substituting a charity in his place. J. Howard Marshall II could not, however, have added Vickie Lynn Marshall as a beneficiary because she was not a named beneficiary of the trust as of July 13, 1994.

The parties vigorously contested whether J. Howard Marshall II voluntarily altered his trust so it would be irrevocable, or whether E. Pierce Marshall altered the trust without his father's knowledge. Vickie Lynn Marshall placed in issue the question whether J. Howard Marshall II possessed the mental capacity requisite to make any change to the terms of the trust. Our review of the trial records in the Texas probate court and in the United States district court discloses conflicting findings of fact critical to the merits of the cases of the contesting parties. The Texas probate court found that J. Howard Marshall II's 1982 trust, as amended, and his last will and

testament were valid and had not been forged or altered; J. Howard Marshall II had the requisite mental capacity when he executed the 1982 trust, as amended, and his last will and testament; J. Howard Marshall II had not been the victim of fraud or undue influence; J. Howard Marshall II did not have an agreement with Vickie Lynn Marshall that he would give her one-half of all of his property; and J. Howard Marshall II did not intend to give and did not give Vickie Lynn Marshall a gift from his 1982 trust, as amended, or a bequest in his last will and testament. The United States district court made findings that E. Pierce Marshall, in concert with an attorney, "backdated documents, altered documents, destroyed documents, suborned falsified notary statements, presented documents to J. Howard [Marshall II] under false pretenses, and committed perjury," all in an effort to prevent J. Howard Marshall II from giving a gift to Vickie Lynn Marshall. The United States district court also determined that E. Pierce Marshall had tortiously interfered with Vickie Lynn Marshall's expectancy of an inter vivos gift from the decedent. The district court concluded that such conduct was actionable under Texas law.

On September 29, 1994, J. Howard Marshall II delivered gifts to Vickie Lynn Marshall valued at approximately $6 million "in consideration of her marriage to me." These gifts were memorialized in a document called the "Act of Donation." They included Compagnie Victoire,[1] jewelry, title to a ranch property located in Texas, and a Mercedes Benz automobile. Vickie Lynn Marshall accepted these gifts on October 27, 1994. These gifts are all undisputed and Vickie

[1] J. Howard Marshall II created Compagnie Victoire as a vehicle to invest in Vickie Lynn Marshall's career as a model.

Lynn Marshall does not contend that J. Howard Marshall II lacked the mental capacity to make these itemized gifts.[2]

J. Howard Marshall II died of heart failure on August 4, 1995, at the age of ninety.

II

The claims of Vickie Lynn Marshall that we consider in this appeal involve gifts, trusts, and probate matters. It is undisputed that Texas law governs the 1982 trust, as amended, and the last will and testament of J. Howard Marshall II. During the course of this opinion we accept as Texas law several principles.

In Texas, to establish a right to an inter vivos gift, a plaintiff must prove "(1) [donor's] intent to make a gift; (2) [donor's] delivery of the property; and (3) [donee's] acceptance of the property." *Dorman v. Arnold*, 932 S.W.2d 225, 227 (Tex.App.1996). Mere intent of donor or donee is not enough. *See Oadra v. Stegall*, 871 S.W.2d 882, 890 (Tex.App.1994). Additionally, under Texas law, inter vivos gifts are not valid if they are meant to take effect only upon the donor's death, unless there is a valid deathbed transfer. *Dorman*, 932 S.W.2d at 227-29. The Texas probate courts are wary of allegations of an inter vivos gift where the claim is made after the purported donor's death.

[2] When referring to the question whether J. Howard Marshall II intended to give Vickie Lynn Marshall a gift, we are referring to Vickie Lynn Marshall's allegation that J. Howard Marshall II intended to give her a further gift during his life in the form of a catch-all trust worth at least half the increase in value of all his property, if not half of all his property.

"He who attempts to establish title to property through a gift inter vivos, as against the estate of a decedent, takes upon himself a heavy burden, which he must support by evidence of clear and probative force, which clearly establishes every element of a valid gift." *Id.* at 228.

Under Texas law a trust may be created by:

> (1) a property owner's declaration that the owner holds the property as trustee for another person;
>
> (2) a property owner's inter vivos transfer of the property to another person as trustee for the transferor or a third person;
>
> (3) a property owner's testamentary transfer to another person as trustee for a third person;
>
> (4) an appointment under a power of appointment to another person as trustee for the donee of the power or for a third person; or
>
> (5) a promise to another person whose rights under the promise are to be held in trust for a third person.

Tex. Prop. Code § 112.001. "There exist no particular forms or words required to create a trust, if there exists reasonable certainty as to a putative trust's property, object and beneficiaries." *Tomlinson v. Tomlinson*, 960 S.W.2d 337, 338 (Tex.App.1997). Texas courts look to the settlor's intent to determine whether a trust was created.[3]

[3] Texas law also mandates that

> [a] trust in either real or personal property is enforceable only if there is written evidence of the trust's terms bearing the signature of the settlor or the settlor's authorized agent. A trust consisting of personal property, however, is enforceable if

(Continued on following page)

Barrientos v. Nava, 94 S.W.3d 270, 280 (Tex.App.2002) (citing Tex. Prop. Code § 112.002).

Texas courts have consistently refused to allow a litigant to sue in tort for interference with the expectancy of an inheritance where the decedent's will is upheld in probate court. *See Thompson v. Deloitte & Touche*, 902 S.W.2d 13, 16 (Tex.App.1995); *Neill v. Yett*, 746 S.W.2d 32, 35 (Tex.App.1988). Under Texas law, "the facts involved and the relief requested are determinative as opposed to the label by which the claim is called. Simply put, the substance of what is pled controls, not the label or name appended to the claim." *Tri-State Chems., Inc. v. Western Organics, Inc.*, 83 S.W.3d 189, 194 (Tex.App.2002).

III

The route followed by the parties to this appeal on their epic journey is a tortuous one indeed. To facilitate an understanding of the voluminous record before us and to recognize the conflicting judgments which have been entered to date, we detail the history of the prior proceedings in state and federal courts.

> created by: (1) a transfer of the trust property to a trustee who is neither settlor nor beneficiary if the transferor expresses simultaneously with or prior to the transfer the intention to create a trust; or (2) a declaration in writing by the owner of property that the owner holds the property as trustee for another person or for the owner and another person as a beneficiary.

TEX. PROP. CODE § 112.004.

A

In April 1995, before the death of J. Howard Marshall II, an action was commenced in the probate court of Texas. Vickie Lynn Marshall sued E. Pierce Marshall in his individual capacity and in his capacities as the co-trustee of J. Howard Marshall II's Living Trust, as the agent for J. Howard Marshall II under a Power of Attorney dated July 13, 1994, and as the Temporary Guardian of the Person of J. Howard Marshall II. Vickie Lynn Marshall alleged that E. Pierce Marshall was tortiously interfering with her statutory right to support from her husband and that E. Pierce Marshall had breached his fiduciary duties as a Trustee. She also sought a declaration concerning the ownership of the assets in the Living Trust and challenged the validity of the Living Trust, claiming E. Pierce Marshall procured its execution by fraud and undue influence upon J. Howard Marshall II.[4]

Vickie Lynn Marshall alleged that E. Pierce Marshall in his individual capacity tortiously interfered with her statutory right to support from her husband and that E. Pierce Marshall had breached his fiduciary duties as a trustee of the 1982 trust agreement, as amended. Vickie Lynn Marshall sought a declaratory judgment establishing her interest in the property in the 1982 trust. She challenged the validity of the 1982 trust, as amended, alleging that E. Pierce Marshall procured its execution by fraud and undue influence upon J. Howard Marshall II. Three days after J. Howard Marshall II's death, Vickie Lynn

[4] There were also proceedings in Louisiana state court, which are not at issue here. *See In re Howard Marshall Charitable Remainder Annuity Trust*, 709 So.2d 662 (La.1998).

Marshall filed a petition in the Texas probate court to establish that J. Howard Marshall II died intestate.

E. Pierce Marshall opposed the surviving spouse's petition and offered J. Howard Marshall II's last will and testament for probate on August 16, 1995. E. Pierce Marshall filed a counterclaim in which he sought a declaration that both his father's last will and testament and his father's 1982 trust, as amended, were legally valid instruments.

Vickie Lynn Marshall then contested the validity of her husband's last will and testament and sought a declaration that his 1982 trust, as amended, was null and void. Several other parties joined the proceedings seeking a share of the estate. These parties include J. Howard Marshall III, the other son of the decedent. None of these intervening parties have joined in these appellate proceedings.

By a third amended petition,[5] Vickie Lynn Marshall alleged that E. Pierce Marshall, his attorneys, and others tortiously interfered with her expectation based upon her belief that J. Howard Marshall II had promised to give her gifts both inter vivos and post mortem. Those promises are asserted to be oral and are not supported by any written

[5] Vickie Lynn Marshall sued E. Pierce Marshall in his individual capacity, as the agent for J. Howard Marshall II under a Power of Attorney, and in his capacity as the Trustee or dominant shareholder for each of the following: the J. Howard Marshall II Living Trust; the Marshall Museum and Library of Racing; Marshall Petroleum, Inc.; Marshall Oil & Gas L.L.C.; the Marshall Grandchildren's Trust; Marshall Petroleum, Inc. Stock Holding Trust; the Betty B. Marshall Living Trust; the J. Howard Marshall II Marital Trust Number Two; and the E. Pierce Marshall Family Trust.

evidence of the specific terms upon which any specific gift is promised. Vickie Lynn Marshall again challenged the validity of the 1982 trust, as amended, and the last will and testament of the decedent.

In each of her petitions before the Texas probate court, Vickie Lynn Marshall asserted that the probate court was vested with general probate jurisdiction to hear and decide all of her asserted claims.

B

We now shift to another forum because Vickie Lynn Marshall, claiming to be a resident of the State of California, sought protections available under the bankruptcy laws of the United States.

During the pendency of the probate proceedings in the Texas probate court, Vickie Lynn Marshall filed a voluntary Chapter 11 bankruptcy petition on January 25, 1996, in the United States District Court for the Central District of California. Vickie Lynn Marshall was a debtor in possession and as such she was responsible for the payments to her creditors.

E. Pierce Marshall, in his individual capacity, filed a claim against Vickie Lynn Marshall's bankruptcy estate. He sought a declaration barring the discharge of any potential causes of action against Vickie Lynn Marshall for defamation and attorneys' fees which could be awarded by any court in the future.

Vickie Lynn Marshall, as debtor in possession of the Chapter 11 bankruptcy estate, filed counterclaims in the bankruptcy case against E. Pierce Marshall in his individual capacity for tortiously interfering with her expectancy

of a gift or bequest from J. Howard Marshall II. Specifically, the allegations included the following:

> (1) tortiously interfering with her expectancy of a gift or bequest from J. Howard Marshall II;
>
> (2) interfering with her rights as J. Howard Marshall II's surviving spouse;
>
> (3) fraudulently effecting an inter vivos transfer of J. Howard Marshall II's property in trust;
>
> (4) abuse of legal process;
>
> (5) imprisonment of J. Howard Marshall II against his will;
>
> (6) breach of contract;
>
> (7) breach of fiduciary duty;
>
> (8) exerting fraud, duress and undue influence over J. Howard Marshall II in the making of his last will and testament; and
>
> (9) undue influence causing modification of the 1982 trust.

Only Vickie Lynn Marshall's claim for tortious interference with her expectancy of a gift actually went to trial.

E. Pierce Marshall moved to dismiss Vickie Lynn Marshall's claims for lack of subject matter jurisdiction, arguing that the Texas probate court had exclusive jurisdiction. The probate exception to federal court jurisdiction was expressly invoked in the bankruptcy court proceedings. The bankruptcy court denied E. Pierce Marshall's motion to dismiss for lack of jurisdiction.

E. Pierce Marshall then moved the district court to withdraw the litigation from the bankruptcy court. Upon

removal to district court, the Honorable William Keller initially presided. Judge Keller granted the motion, but left the bankruptcy court to resolve pending discovery disputes. In so doing, Judge Keller stated that he thought the substantive matters at issue involved the application of Texas trust and estate law and properly belonged in the Texas probate court.

On February 2, 1999, Bankruptcy Judge Samuel L. Bufford entered a sanctions order against E. Pierce Marshall for discovery abuse. The sanction imposed by the court deemed almost all facts alleged in pleadings filed by the attorneys for Vickie Lynn Marshall to be admitted facts in support of each of the pleaded legal theories upon which judgment was sought against E. Pierce Marshall.

On March 8, 1999, the bankruptcy court confirmed Vickie Lynn Marshall's Chapter 11 plan of reorganization and discharged her scheduled debts. All of the property subject to bankruptcy then reverted to Vickie Lynn Marshall in her personal capacity. This permitted Vickie Lynn Marshall to vigorously pursue all of her legal and equitable actions against E. Pierce Marshall in both the California bankruptcy court and the Texas probate court.

The district court vacated the bankruptcy court's sanctions order at a hearing on March 9, 1999, finding that the order was not supported by the evidence. Judge Keller emphasized again his view that the matter belonged in probate court. The district court vacated its prior withdrawal of the matter and returned the case to bankruptcy court.

On May 20, 1999, the bankruptcy court reentered its sanctions order with the addition of footnotes to explain its decision. In the order, the bankruptcy court once again

deemed Vickie Lynn Marshall's allegations against E. Pierce Marshall to be established. As a result of this sanctions order, E. Pierce Marshall was not allowed to present conflicting evidence at the evidentiary hearing to determine whether Vickie Lynn Marshall was entitled to damages.

The bankruptcy court held a five day hearing commencing on October 27, 1999. The court found that E. Pierce Marshall tortiously interfered with Vickie Lynn Marshall's expectancy that she would receive an inter vivos gift from J. Howard Marshall II in the form of a catch-all trust that would take effect upon the death of J. Howard Marshall II. The bankruptcy court also concluded that the Texas Supreme Court would recognize the tort of intentional interference with the expectancy of a gift if the issue were presented to it, and that the probate exception did not apply as a jurisdictional bar to Vickie Lynn Marshall's tort claim. The bankruptcy court then entered summary judgment denying E. Pierce Marshall's defamation claims against Vickie Lynn Marshall.[6]

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[6] In his complaint entitled "Complaint to Determine the Dischargeability of Debt Pursuant to 11 U.S.C. § 523(a)(6)" E. Pierce Marshall sought: "1. A determination that [E. Pierce Marshall's] claims against the Defendant have not been discharged; 2. An order granting [E. Pierce Marshall] recovery for his reasonable costs and attorney's fees incurred herein and pre- and post-judgment interest as allowed by law; and 3. An order granting [E. Pierce Marshall] such other relief as is just." Instead of adjudicating only the question whether any recovery that E. Pierce Marshall might obtain against Vickie Lynn Marshall for defamation was dischargeable, the bankruptcy court made several findings including that Vickie Lynn Marshall did not publish any defamatory statements about E. Pierce Marshall, she did not authorize her attorneys to publish defamatory statements concerning E. Pierce Marshall, she did not ratify any defamatory statements published by

(Continued on following page)

On January 18, 2000, the bankruptcy court *sua sponte* withdrew its sanctions order, but did not change any of its other rulings which had been based on the allegations by Vickie Lynn Marshall deemed true. The court did not hold another evidentiary hearing.

On September 27, 2000, the bankruptcy court made express findings that E. Pierce Marshall had tortiously interfered with Vickie Lynn Marshall's expectation that she would inherit from J. Howard Marshall II's estate. The court reasoned that a "widow's election" under Texas law supported a monetary judgment. The court awarded Vickie Lynn Marshall nearly four hundred and fifty million dollars, but stated that the final calculation of damages was contingent and could be modified upon the completion of the Texas probate action.

On October 6, 2000, the bankruptcy court entered a revised judgment against E. Pierce Marshall, individually, again for nearly four hundred and fifty million dollars, less whatever proceeds Vickie Lynn Marshall received from the estate of J. Howard Marshall II. In its revised judgment the bankruptcy court awarded damages based, not on Vickie Lynn Marshall's "widow's election," but rather as sanctions for discovery abuse by E. Pierce Marshall during the adversary proceeding.

Despite the earlier withdrawal of its sanctions order, the court stated that it made the following findings as sanctions for discovery abuse:

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her attorneys, and she did not owe any debt to E. Pierce Marshall because she was not vicariously liable for any alleged defamatory statements published by her attorneys.

> (1) E. Pierce Marshall interfered with gifts J. Howard Marshall II wished to make to Vickie Lynn Marshall by firing one attorney and conspiring with another to prevent the transfer of property from the trust;
>
> (2) E. Pierce Marshall devised a secret plan to make J. Howard Marshall II's trust irrevocable; and
>
> (3) E. Pierce Marshall added the clause to the 1982 trust making it irrevocable after J. Howard Marshall II died.

The bankruptcy court found that Vickie Lynn Marshall had an expectancy of a gift based upon J. Howard Marshall II's promises to her and his instructions to his attorneys to prepare a "catch-all" trust for her that would entitle her to one-half of the future appreciation of his interest in his Marshall Petroleum, Inc. stock.

On November 21, 2000, the bankruptcy court entered a further order for punitive damages against E. Pierce Marshall, individually, in the sum of twenty-five million dollars. These damages were imposed for discovery abuses. In this order, the bankruptcy court held that the claim of Vickie Lynn Marshall was a "core" bankruptcy proceeding.

On December 29, 2000, the bankruptcy court entered its final judgment against E. Pierce Marshall individually in the amount of $474,754,134.

C

During the bankruptcy court proceedings, litigation continued in the Texas probate court. On January 5, 2001, shortly after the bankruptcy court entered its judgment,

Vickie Lynn Marshall filed a nonsuit with respect to all her pending claims in the Texas probate proceeding. The Texas probate judge expressly explained that, by reason of the filing and granting of a nonsuit, all of Vickie Lynn Marshall's claims against the decedent's estate would be forfeited. In open court the probate judge warned her as follows:

> Even if you take a nonsuit, which under the Rules of Civil Procedure give you a right to refile it, as a practical matter you don't, because the Estate is gone. . . . *Your claim to anything that the Decedent had at any time in his life is over when this final judgment is signed.* The fact that the Rules of Civil Procedure allow you to take a nonsuit and re-file later doesn't really apply in Probate Court when we're talking about who is entitled to an Estate.

Despite the probate court's warnings, Vickie Lynn Marshall freely elected to dismiss her claims against the estate of J. Howard Marshall II and against E. Pierce Marshall, individually and in his representative capacities. However, the non-suit did not dismiss Vickie Lynn Marshall as a defendant in the declaratory judgment action seeking to establish that the 1982 trust, as amended, and the decedent's last will and testament were valid.

On February 9, 2001, E. Pierce Marshall filed an amended counterclaim against Vickie Lynn Marshall and others having any interest in the estate for declaratory relief to determine their rights against the estate of J. Howard Marshall II.

The Texas probate court conducted a jury trial that lasted more than five months, in which all parties fully participated. Vickie Lynn Marshall and J. Howard Marshall

III contested the validity of every estate planning transaction from 1979 forward which involved J. Howard Marshall II or any interest in his property. Specific testimony recounted the many transfers of property in trust by J. Howard Marshall II and from the trust to E. Pierce Marshall.

Vickie Lynn Marshall presented her entire case in chief, including six days of her own testimony and a lengthy cross-examination of E. Pierce Marshall.[7] Vickie Lynn Marshall testified extensively regarding her expectancy of a gift, including her allegation that J. Howard Marshall II promised her one-half of all his property.[8] Vickie Lynn Marshall claimed in the Texas probate proceeding that E. Pierce Marshall had destroyed relevant documents, including those relating to the catch-all trust for the benefit of Vickie Lynn Marshall.

The jury in the Texas probate court returned a unanimous verdict on March 7, 2001. Consistent with the jury's verdict, the Texas probate court entered a final judgment dated December 7, 2001, which included the following provisions:

> (1) the 1982 trust, as amended, and last will and testament of J. Howard Marshall II were valid and had not been forged or altered;
>
> (2) J. Howard Marshall II had not been the victim of fraud or undue influence;

---

[7] In opening statement, Vickie Lynn Marshall's counsel told the jury that "[t]his case is about tortious interference with an intent to give an inter vivos gift."

[8] This testimony apparently did not provoke the invocation of the Texas Deadman's Statute. *See* Tex.R. Evid. 601(b).

(3) J. Howard Marshall II possessed the requisite mental capacity when he executed the 1982 trust, as amended, and his last will and testament;

(4) J. Howard Marshall II did not intend to give and did not give Vickie Lynn Marshall a gift or bequest from the Estate of J. Howard Marshall II or from the 1982 trust, as amended, either prior to or upon his death;

(5) Vickie Lynn Marshall was not entitled to any distribution from the Estate of J. Howard Marshall II by virtue of an agreement;

(6) Vickie Lynn Marshall was entitled to take nothing against any of the defendants;

(7) E. Pierce Marshall was entitled to his distribution as set forth in the 1982 trust, as amended, and as provided in the last will and testament of J. Howard Marshall II;

(8) E. Pierce Marshall was entitled to a judgment for $541,000 as attorney's fees payable by Vickie Lynn Marshall for her conduct after the time of her bankruptcy discharge through the end of the Texas trial;[9]

(9) the claims of Vickie Lynn Marshall against E. Pierce Marshall were compulsory counterclaims that were required to be brought in the probate suit;

[9] On February 26, 2002, the bankruptcy court found that the Texas court's award of attorney's fees violated the bankruptcy discharge. The district court affirmed this order on August 15, 2002. This ruling is the subject of appeal No. 02-56603 and is addressed in a separate disposition.

(10) Vickie Lynn Marshall voluntarily abandoned her claims to any interest in the property, the 1982 trust, as amended, or the estate of J. Howard Marshall II; and

(11) all claims by Vickie Lynn Marshall against E. Pierce Marshall, both individually and in his various representative capacities, were dismissed.

The Texas probate court declared as a matter of law that it had exclusive and dominant jurisdiction over all claims arising out of the last will and testament, the 1982 trust, as amended, and all property interests of J. Howard Marshall II. In addition, the Texas probate court asserted exclusive jurisdiction over all affirmative claims brought and all compulsory counterclaims that could have been brought by either J. Howard Marshall III or Vickie Lynn Marshall, as well as all claims regarding any completed gift made by J. Howard Marshall II either during his life or any gift to take effect upon his death.

D

E. Pierce Marshall appealed the bankruptcy judgment to the district court. The district court asserted original bankruptcy jurisdiction. 28 U.S.C. § 1334. After the Texas probate court entered its judgment, E. Pierce Marshall moved in the district court to dismiss Vickie Lynn Marshall's claim against him, asserting that her claim was barred by both claim preclusion and issue preclusion. The motion papers argued that the matters at issue in the federal courts had been decided in the Texas probate proceeding. E. Pierce Marshall also argued that the claims of Vickie Lynn Marshall were subject to dismissal under the probate exception to federal jurisdiction.

On June 19, 2001, the district court affirmed the bankruptcy court's determination that federal jurisdiction was proper over Vickie Lynn Marshall and her several claims. The district court determined that:

> (1) the Texas probate court had not ruled on the claims of Vickie Lynn Marshall against E. Pierce Marshall in his individual capacity;
>
> (2) the probate exception to federal jurisdiction did not apply because the probate exception applied only to the probate of wills;
>
> (3) the claims of Vickie Lynn Marshall did not involve the last will and testament of J. Howard Marshall II, deceased; and
>
> (4) Vickie Lynn Marshall could have filed her complaint in a court other than a probate court in Texas and thus her claim was not a compulsory counterclaim in the probate case.

The district court then vacated the bankruptcy court's final judgment because it concluded that Vickie Lynn Marshall's claim was not a "core" bankruptcy claim, and that the bankruptcy court's judgment merely constituted proposed findings of fact and conclusions of law.

On December 21, 2001, the district court denied E. Pierce Marshall's summary judgment motion based on claim and issue preclusion. The district court then set about its own de novo review.

On March 7, 2002, the district court entered a final judgment against E. Pierce Marshall. The final judgment, which is the principal subject of this appeal, was entered in the United States District Court for the Central District of California, David O. Carter, District Judge, presiding.

The district court determined that although the Supreme Court of Texas had not yet done so, that court would recognize the tort of intentional interference with the expectancy of a gift under Texas law. The district court also determined that J. Howard Marshall II intended to give Vickie Lynn Marshall a gift in the form of a newly created trust. According to the district court, this trust was to take effect after the decedent's death. The specific trust corpus is not identified in the court's findings. We note the absence of any findings which tell us how to identify the prospective trustee and exactly how the distribution scheme for delivery of property is to work. The district court also concluded that E. Pierce Marshall tortiously interfered with J. Howard Marshall II's intentions by engaging in illegitimate "estate planning" transactions involving his father, and that E. Pierce Marshall altered the 1982 trust instrument, thereby invalidating it. The district court entered judgment in favor of Vickie Lynn Marshall which specifies an award of $88,585,534.66 for compensatory and punitive damages, plus costs of suit.

The appeal taken from the district court by E. Pierce Marshall and the cross appeal taken by Vickie Lynn Marshall have favored us with over 440 pages of appellate briefs prepared by their attorneys and they have required us to review one of the most extensive records ever produced in the Central District of California.

IV

Jurisdiction is a question of law which we review de novo. *United States v. Garrett*, 253 F.3d 443, 446 (9th Cir.2001). We retain jurisdiction to determine whether we

have jurisdiction. *See United States v. United Mine Workers*, 330 U.S. 258, 291, 67 S.Ct. 677, 91 L.Ed. 884 (1947).

V

E. Pierce Marshall contends that the probate exception to federal jurisdiction applies and that as a result the federal courts lack jurisdiction over the subject matter of this appeal. It is considered well established

> that since it does not pertain to the general jurisdiction of a court of equity to set aside a will or the probate thereof, or to administer upon the estates of decedents in rem, matters of this character are not within the ordinary equity jurisdiction of the federal courts; that as the authority to make wills is derived from the States, and the requirement of probate is but a regulation to make a will effective, matters of strict probate are not within the jurisdiction of courts of the United States.

Sutton v. English, 246 U.S. 199, 205, 38 S.Ct. 254, 62 L.Ed. 664 (1918). A federal court may "entertain suits in favor of creditors, legatees and heirs and other claimants against a decedent's estate to establish their claims so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in custody of the state court." *Markham v. Allen*, 326 U.S. 490, 494, 66 S.Ct. 296, 90 L.Ed. 256 (1946) (internal quotation marks omitted).

Vickie Lynn Marshall argues that we need not consider the applicability of the probate exception because it operates only where the federal court has diversity jurisdiction and not in federal question cases. She relies on the

Eleventh Circuit's decision in *Goerg v. Parungao* for the proposition that the probate exception applies only to statutory diversity jurisdiction. 844 F.2d 1562, 1565 (11th Cir.1988). In *Goerg* the court stated: "Care should be taken not to confuse the question of the breadth of Congress' bankruptcy power with the so-called 'probate exception' to statutory diversity jurisdiction. That exception relates only to 28 U.S.C. § 1332 (1982) [diversity cases], and has no bearing on federal question jurisdiction, the jurisdiction invoked in bankruptcy cases." *Id.* This language from *Goerg* appears to support the proposition that the probate exception does not apply to federal question cases; however, we believe that this statement is *dicta*. The issue on appeal in *Goerg* was "whether section 304 of the Bankruptcy Code . . . opens United States bankruptcy courts to proceedings ancillary to foreign insolvency proceedings where the entity that is the subject of the foreign proceeding qualifies for insolvency administration under foreign law, but does not fall within the Bankruptcy Code's definition of 'debtor.'" *Id.* at 1563.

Although courts commonly refer to the probate exception as "the probate exception to diversity jurisdiction," *see, e.g., Marshall v. Lauriault*, 372 F.3d 175, 181 (3d Cir.2004), no other circuit has followed the Eleventh Circuit's lead in refusing to apply the exception to federal question cases.[10] In contrast, the Sixth Circuit has applied the probate exception to a case that was brought under 42 U.S.C. § 1983. *See Tonti v. Petropoulous*, 656 F.2d 212, 215-16 (6th Cir.1981).

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[10] *Lepard v. NBD Bank*, 384 F.3d 232, 237 (6th Cir.2004), cited by E. Pierce Marshall, is a diversity case and does not shed any new light on whether the probate exception also applies to federal question cases.

More importantly, the *Goerg* rule conflicts with Supreme Court precedent. Contrary to Vickie Lynn Marshall's argument, the Supreme Court has evaluated the probate exception in federal jurisdiction cases, including bankruptcy, and in doing so the court has said nothing that limits the probate exception to diversity cases. *See, e.g., Markham v. Allen*, 326 U.S. at 493-95, 66 S.Ct. 296; *Harris v. Zion Sav. Bank & Trust Co.*, 317 U.S. 447, 450-53, 63 S.Ct. 354, 87 L.Ed. 390 (1943) ("The probate court, not the bankruptcy court, is the appropriate forum for weighing the respective benefits or detriments to those who share in the equity of the decedent's estate."). The court's statement in *Harris* that "the federal courts have no probate jurisdiction and have sedulously refrained, *even in diversity cases*, from interfering with the operations of state tribunals invested with that jurisdiction" suggests that the probate exception also encompasses federal question cases. 317 U.S. at 450, 63 S.Ct. 354 (emphasis added).

Consistent with *Harris*, this court has said that, in applying the probate exception, "[t]he evil to be avoided is federal interference with state probate proceedings." *Hilton v. Mumaw*, 522 F.2d 588, 593 (9th Cir.1975). This rationale is as relevant to federal question cases as it is to diversity ones.

We specifically reject the *Goerg* pronouncement and hold that the probate exception is applicable in bankruptcy cases. We proceed to determine whether the exception applies under the facts of this case.

We have few precedents which address the probate exception so we shall consider and borrow from the established body of case law more thoroughly developed in our

sister circuits. In particular, we adopt the framework for analysis laid out by the Second Circuit in *Moser v. Pollin*, 294 F.3d 335, 340 (2d Cir.2002), because it mirrors the explanation of the probate exception as set forth by the Supreme Court in *Markham*.[11]

In *Moser* the Second Circuit engaged in a two part inquiry to determine whether the controversy before it implicated probate matters such that the probate exception to federal jurisdiction applied. 294 F.3d at 340. The first part of the inquiry focuses on the question whether the matter is purely probate in nature, in that the federal court is being asked directly to probate a will or administer an estate. *Id.* As the *Moser* court noted "since few practitioners would be so misdirected as to seek, for example, letters testamentary or letters of administration

[11] Other circuits have considered the probate exception but justify their decisions without strict adherence to the doctrine as enunciated by the Supreme Court in *Markham*. *See, e.g., Lepard v. NBD Bank*, 384 F.3d 232, 237 (6th Cir.2004) (stating that "'[t]he standard for determining whether federal jurisdiction may be exercised is whether under state law the dispute would be cognizable only by the probate court'") (quoting *McKibben v. Chubb*, 840 F.2d 1525, 1529 (10th Cir.1988)); *Storm v. Storm*, 328 F.3d 941, 944 (7th Cir.2003) (stating that in determining whether it has jurisdiction over a particular case, a court should consider the policy goals underlying the probate exception, such as encouraging legal certainty, promoting judicial economy, avoiding unnecessary interference with the state law system, and respecting relative expertness of probate judges; also stating that courts should construe the probate exception narrowly); *Breaux v. Dilsaver*, 254 F.3d 533, 536 (5th Cir.2001) (stating that "[i]n determining whether a suit in federal court 'interferes' with state probate proceedings, this court considers whether the plaintiff's claim 'implicates the validity of the probate proceedings or whether the plaintiff is merely seeking adjudication of a claim between the parties'") (citations omitted); *Mangieri v. Mangieri*, 226 F.3d 1, 2 (1st Cir.2000) (stating that "courts tend to view the probate exception as extending to all suits 'ancillary' to the probate of a will") (citing *Georges v. Glick*, 856 F.2d 971, 973 (7th Cir.1988)).

from a federal judge," the answer to this question is almost always "No." *Id.* The second part of the inquiry focuses on whether the matter is probate related by determining whether, by exercising jurisdiction over the matter, the federal court would: (1) interfere with the probate proceedings; (2) assume general jurisdiction of the probate; or (3) assume control over property in custody of the state court.[12] *Id.* (citing *Markham*, 326 U.S. at 494, 66 S.Ct. 296). If the answer to any of these questions is yes, then the probate exception applies.

A

The probate of a last will and testament, the validity of a testamentary trust, and the administration of a decedent's estate are matters of primary concern to the several states. The record before us indicates that the district court has neither decided whether the last will and testament of J. Howard Marshall II should be admitted to probate nor whether the dispositive provisions of decedent's 1982 trust, as amended, are valid. The district court did not supervise the administration of the estate of J. Howard Marshall II, with respect to creditor's claims or death tax issues. Because this case does not involve the administration of an estate, the probate of a will, or any other purely probate matter, we will continue on to the second part of the *Moser* analysis to determine whether Vickie Lynn Marshall's counterclaim is probate related such that a federal court, under the probate exception, lacks jurisdiction over the matter.

[12] Because we answer the first two questions in the affirmative we do not reach this question in our analysis.

B

The reach of the probate exception encompasses not only direct challenges to a will or trust, but also questions which would ordinarily be decided by a probate court in determining the validity of the decedent's estate planning instrument. Such questions include fraud, undue influence upon a testator, and tortious interference with the testator's intent. *See Sutton*, 246 U.S. at 207-08, 38 S.Ct. 254 (holding that in Texas a suit that is essentially a claim to property subject to administration in an estate is not within the jurisdiction of the federal courts); *see also Turja v. Turja*, 118 F.3d 1006, 1008-10 (4th Cir.1997) (holding that the probate exception applies to claims of undue influence and lack of testamentary capacity); *Beren v. Ropfogel*, 24 F.3d 1226, 1228-29 (10th Cir.1994) (declining to hear tort claims of interference with expected inter vivos gifts or testamentary dispositions because "the state probate proceeding afforded plaintiffs an 'adequate and available' remedy in state court to contest [the] will" and "[t]he risk of inconsistent results is obvious"); *Dragan v. Miller*, 679 F.2d 712, 714-17 (7th Cir.1982) (refusing to hear a suit by a decedent's natural heirs against the beneficiaries of a will for intentional interference with the expectancy of an inheritance); *Starr v. Rupp*, 25 Ohio Misc. 224, 421 F.2d 999, 1003-07 (6th Cir.1970) (refusing to consider claims for breach of fiduciary duty that had already been rejected by the state court).

J. Howard Marshall II expressly declared that it was his intention to give, devise and bequeath all of his property to E. Pierce Marshall, family trusts, and to various charities through the provisions of his 1982 trust, as amended. Virtually all J. Howard Marshall II's property was to be conveyed post mortem to E. Pierce Marshall

under the terms of the 1982 trust, as amended, for the express uses and purposes detailed as part of the terms of the written trust. The Texas probate court, as the supervisor of estate administration, was required to sort through all claims regarding distribution of the trust corpus. As the probate judge observed, the parties appearing in Texas were there to resolve:

> the question of what [J. Howard Marshall II] had and what he did with it and whether that was proper or improper. All of that was before the Court. Howard Marshall III complained of every transaction that was done since 1979. Every transaction in connection with his estate plan was before this Court, and all of those transactions were found to be valid by the jury, and the Court is going to find them to be valid.

The district court's invalidation of the 1982 trust, as amended, was a necessary step supporting the conclusion that Vickie Lynn Marshall was entitled to a money judgment for damages. The district court specifically determined that the trust was forged and was procured by fraud in direct and irreconcilable conflict with the Texas probate court's judgment entered consistent with the findings of a jury. The district court's finding that J. Howard Marshall II intended to favor Vickie Lynn Marshall with a multi-million dollar gift, devise or bequest of property from his estate stands in direct conflict with the probate court's finding that J. Howard Marshall II did not intend to give, and did not give, Vickie Lynn Marshall any further gift either during his lifetime or post mortem.

The bankruptcy court's judgment was based specifically on Vickie Lynn Marshall's interest in J. Howard Marshall II's estate. In the bankruptcy court Vickie Lynn

Marshall's damages were fixed in a dollar sum, less whatever future sum was to be received from the Texas probate proceedings in the Estate of J. Howard Marshall II. The district court's damage award is likewise based on the theory that property that was distributed from the trust estate of J. Howard Marshall II to E. Pierce Marshall should have been distributed to Vickie Lynn Marshall instead.

Although Vickie Lynn Marshall styles her action as a tort action, it is clear that the exercise of federal jurisdiction would and, in this case, did interfere with the Texas probate court proceedings. Vickie Lynn Marshall argues that her counterclaim is a personal one against E. Pierce Marshall as an individual and not against the estate. She cites *Breaux v. Dilsaver* for the proposition that the probate exception is inapplicable to an action against an administrator of an estate in his personal capacity because the judgment would be satisfied from the defendant's own property and not from the decedent's estate. 254 F.3d 533, 536-37 (5th Cir.2001). *Breaux* did not involve a challenge to the validity of the decedent's will or the distribution of estate property. *Id.* at 537. The personal representative's performance of his duties under the will was the only matter at issue. *Id.* at 535. Here this is not the case. In her brief, Vickie Lynn Marshall argues that she is entitled to nothing either from the 1982 trust, as amended, or the estate itself. Rather, she contends that she is entitled to the amount that J. Howard Marshall II intended to give her, in the form of a separate catch-all trust, but for the improper interference by E. Pierce Marshall. Regardless of the way in which Vickie Lynn Marshall seeks to characterize her lawsuit, "it is in substance nothing more than a thinly veiled will contest." *Moser*, 294 F.3d at 340-41.

"[M]ere labels – whether an action is styled as a tort action or will contest – are not decisive in our probate-exception analysis." *Storm v. Storm*, 328 F.3d 941, 945 (7th Cir.2003). When the district court entered a judgment in favor of Vickie Lynn Marshall in the form of a damage award based upon what the court thought she should have received from J. Howard Marshall II's estate, the power of the Texas probate court was negated.

The Seventh Circuit, in a case very similar to this one, addressed some of these same issues. In *Storm v. Storm*, the grandson of the decedent filed an action seeking to obtain damages for tortious interference with an inheritance expectancy. 328 F.3d at 942. The court held that while the plaintiff

> phrases his action as one involving tortious interference with his inheritance expectancy, the practical effect of his lawsuit would be similar to that of a successful will contest: the terms of the final, allegedly invalid testamentary instruments would essentially be bypassed, while [the plaintiff] would receive, as damages, the assets he would have otherwise been entitled to under what he says are [the decedent's] actual will and trust.

Id. at 945. Here the terms, held to be valid by the Texas probate court, of J. Howard Marshall II's 1982 trust, as amended, were bypassed by the district court when it granted damages "in the amount that J. Howard intended to give her." Although Vickie Lynn Marshall couches her claims in terms of tortious interference, if we were to uphold the decision of the district court we would essentially be allowing Vickie Lynn Marshall a second chance to

litigate her claim against the estate of J. Howard Marshall II.

Vickie Lynn Marshall also contends that the probate exception is not applicable because her counterclaim concerns E. Pierce Marshall's interference with an inter vivos gift and that the gift was not a testamentary disposition. We find no support for this argument. The probate exception applies not only to contested wills, but also to trusts that direct a post mortem disposition of the trustor's property. *See Golden ex rel. Golden v. Golden*, 382 F.3d 348, 359 (3d Cir.2004) (agreeing with *Storm*, 328 F.3d at 947, that "causes of action involving trusts are treated under the probate exception in the same way as actions involving wills"). An inter vivos trust which disposes of property upon the death of the settlor is a recognized will substitute. *See Georges v. Glick*, 856 F.2d 971, 974 n. 2 (7th Cir.1988); *see also Storm*, 328 F.3d at 947.

Vickie Lynn Marshall cannot avoid the probate exception simply by stating that the trust which she claims was to be created for her benefit was an inter vivos trust. Here, the trust put into question by Vickie Lynn Marshall (the 1982 trust, as amended), not only controlled the distribution of J. Howard Marshall II's property during his lifetime, but also provided for the post mortem disposition of trust property. The trust executed by J. Howard Marshall II constituted the centerpiece of his estate plan. By declaring that the trust was invalid, the bankruptcy and district courts directly interfered with the Texas probate court's administration of the decedent's estate.

C

Where a state has relegated jurisdiction over probate matters to a special court and if that state's trial courts of general jurisdiction do not have jurisdiction to hear probate matters, then the federal courts also lack jurisdiction over probate matters. *McCan v. First Nat'l Bank of Portland*, 139 F.Supp. 224, 227 (D.Or.1954), *aff'd*, 229 F.2d 859 (9th Cir.1956). A state court's holding regarding its jurisdiction over probate matters is binding on federal courts and is immune from collateral attack under the doctrine of *res judicata*. *Underwriters Nat'l Assurance Co. v. N.C. Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 706-07, 102 S.Ct. 1357, 71 L.Ed.2d 558 (1982); *Durfee v. Duke*, 375 U.S. 106, 111, 115-16, 84 S.Ct. 242, 11 L.Ed.2d 186 (1963).

The probate exception to federal court jurisdiction is invoked because the state probate court must have exclusive in rem jurisdiction over all claims either against or on behalf of the decedent's estate. The probate jurisdiction extends to all probate matters whether based on a theory of tax liability, debt, gift, bequest, tort, or any other theory that interferes with the probate of wills or the state court's ability to engage in the administration of estates. Such jurisdiction is necessary for a probate court to perform its function properly in determining the lawful distribution of the decedent's estate. Because probate proceedings are actions in rem, they bind all persons unless set aside in the manner provided by law. *Mooney v. Harlin*, 622 S.W.2d 83, 85 (Tex.1981). "An in rem judgment ... is binding upon the whole world and specifically upon persons who have rights or interest in the subject matter, and this is so whether those persons were or were not personally served." *Ladehoff v. Ladehoff*, 436 S.W.2d 334,

336 (Tex.1968). The probate court ruled it had exclusive jurisdiction over all of Vickie Lynn Marshall's claims against E. Pierce Marshall. That ruling was binding on the United States district court. *Durfee*, 375 U.S. at 115-16, 84 S.Ct. 242; *see also* TEX. PROB. CODE §§ 5A(b), 5(f) ("[A]ny cause of action appertaining to estates or incident to an estate shall be brought in a statutory probate court" rather than in the district court, including "all matters relating to the collection, settlement, partition, and distribution of estates of deceased persons.").[13]

Upon the death of J. Howard Marshall II, and after the publication of notice to creditors, all claims against the decedent and his estate were required to be made in the probate proceedings. The Texas probate court had exclusive jurisdiction over Vickie Lynn Marshall's claim that J. Howard Marshall II intended to give his spouse a gift because her claim went to the very essence of the testamentary instruments executed by J. Howard Marshall II in his lifetime. The Texas probate court also had exclusive jurisdiction over Vickie Lynn Marshall's claim that E. Pierce Marshall improperly engaged in a series of transactions which wrongfully depleted the trust and estate of J. Howard Marshall II. Had Vickie Lynn Marshall succeeded, the result would have been a money judgment against E. Pierce Marshall and in favor of the estate of J. Howard Marshall II. Whether a party improperly removed an asset from a decedent's estate prior to the decedent's

[13] Vickie Lynn Marshall cites another provision of the Texas Probate Code that applies to counties that are not large enough to have specialized probate courts. J. Howard Marshall II was domiciled in Harris County, where an established probate court is located. Therefore, Texas Probate Code section 5A(b) applies.

death is clearly a matter within the exclusive jurisdiction of the probate courts in Texas. *English v. Cobb*, 593 S.W.2d 674, 675-76 (Tex.1979).[14] Proof of these claims was required to be made and adjudicated in the Texas probate court having exclusive jurisdiction over such claims.

Vickie Lynn Marshall argues that because she voluntarily dismissed her claims in the Texas probate proceeding, her claims are no longer a part of that suit. We agree. The record is clear that E. Pierce Marshall did not dismiss his claims against Vickie Lynn Marshall seeking a declaration that decedent's trust and last will and testament were valid. Vickie Lynn Marshall clearly remained a party in the case. Notwithstanding the dismissal of claims by Vickie Lynn Marshall, the Texas probate court concluded that Vickie Lynn Marshall's claims were compulsory counterclaims under Texas law. *See* TEX. R. CIV. P. 97(a). Thus, Vickie Lynn Marshall was precluded from filing her claims in another court. *See Ingersoll-Rand Co. v. Valero Energy Corp.*, 997 S.W.2d 203, 207 (Tex.1999) (citing *Wyatt v. Shaw Plumbing Co.*, 760 S.W.2d 245, 247 (Tex.1988)).

D

We agree with the contention of E. Pierce Marshall that the probate exception to federal court jurisdiction applies in this case because Vickie Lynn Marshall's claims were simply a disguised attack on J. Howard Marshall II's

[14] As a general proposition, Vickie Lynn Marshall is correct that she was entitled to sue E. Pierce Marshall directly for a tort in her bankruptcy action. It is the probate exception that removes the claim from federal jurisdiction.

1982 trust, as amended, and on the postmortem disposition of his property as provided in the trust.[15]

VI

Due to our resolution of this appeal, we need not address E. Pierce Marshall's arguments concerning claim and issue preclusion, the Seventh Amendment to the U.S. Constitution, the Full Faith and Credit Clause, the *Rooker-Feldman* doctrine, the merits of the district court's judgment and interim rulings, nor whether the Texas Supreme Court would recognize the tort of tortious interference with an expected gift. We specifically withhold approval of the bankruptcy and district courts' holdings that Texas would recognize the tort of tortious interference with an expected gift.

We apply the probate exception to federal court jurisdiction and hold that all judgments awarded to Vickie Lynn Marshall against E. Pierce Marshall should be reversed. We vacate the district court judgment and remand with instructions for the district court to enter an order directing the bankruptcy court to vacate its judgment against E. Pierce Marshall individually. We direct dismissal of the claims of Vickie Lynn Marshall against E. Pierce Marshall for lack of jurisdiction.[16] We also instruct

[15] We need not reach the third question under the second part of the *Moser* analysis as we have answered the first two questions in the affirmative.

[16] E. Pierce Marshall's motion for summary reversal is denied as moot. E. Pierce Marshall's motion to certify to the Texas Supreme Court the question whether Texas recognizes a tort for intentional interference with the expectancy of a gift is denied. E. Pierce Marshall's request that we take judicial notice of the submitted papers is granted.

the district court to consider its lack of jurisdiction under the probate exception as applied to disputes between the parties with respect to procedural interim orders or sanctions awarded either in the district or bankruptcy court. The district court should also instruct the bankruptcy court to address the suggestion by Vickie Lynn Marshall's counsel that it should on remand proceed with Vickie Lynn Marshall's other causes of action. The district court should instruct the bankruptcy court that any further action by the bankruptcy court should be consistent with this opinion.

VACATED AND REMANDED.

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275 B.R. 5

United States District Court,
C.D. California.
In re Vickie Lynn MARSHALL, Debtor.
E. Pierce Marshall, Plaintiff,

v.

Vickie Lynn Marshall, Defendant.
Vickie Lynn Marshall, Counterclaimant,

v.

E. Pierce Marshall, Counter-Defendant.
No. SA CV 01-97 DOC.
Bankruptcy No. LA 96-12510 SB.
Adversary No. AD 96-1838 SB.

March 7, 2002.

Rusty Hardin, Hardin & Associates, B. Lee Ware, Don Jackson, Ware, Snow, Fogel & Jackson, Houston, TX, Robert E. Mangels, Joseph A. Eisenberg, Herbert A. Bernhard, Julia J. Rider, Jeffer, Mangels, Butler & Marmaro, Los Angeles, CA, G. Eric Brunstad, Jr., Bingham, Dana, Hartford, CT, for E. Pierce Marshall.

Philip W. Boesch, Jr., Howard Stern, Boesch Law Group, Eric Berg, Zelle, Hofmann, Voelbel & Gette, Marina Del Rey, CA, Kent Richland, Sheila S. Kato, Greines, Martin, Stein & Richland, Los Angeles, CA, for Vickie Lynn Marshall.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

CARTER, District Judge.

Before the Court is the proposed findings of fact and conclusions of law entered by the bankruptcy court in this

matter on October 6, 2000 and November 21, 2000. Beginning on June 25, 2001, this Court conducted a de novo review of the bankruptcy court's proposed findings. From December 11, 2001 to January 8, 2002, this Court conducted an evidentiary hearing wherein it accepted the testimony of the central figures in the case, documentary evidence, and arguments of counsel. After reviewing all of the evidence in this matter, the Court adopts the findings of fact and conclusions of law of the bankruptcy court, with certain amendments, and makes independent findings of fact and conclusions of law, as set forth below.

PROCEDURAL HISTORY

Defendant and Counterclaimant Vickie Lynn Marshall (Vickie)[1] is the surviving widow of J. Howard Marshall, II (J. Howard), who died on August 4, 1995. Vickie, also known as Anna Nicole Smith, is a figure of some notoriety from her career as a model. J. Howard was also a figure of some notoriety as he was said to be either the richest or second-richest man in Texas at the time of his death.

The magnitude of the sums of money involved in J. Howard's estate has sparked intensely contested litigation on several fronts. First, succession proceedings[2] took place in Louisiana, but were dismissed in 1998 after the Louisiana Supreme Court found jurisdiction lacking in that state. *See In re Howard Marshall Charitable Remainder*

[1] As all the principals in the matter at hand share the same last name, the Court will refer to the parties by their given names, as is customary in cases involving family members.

[2] Louisiana succession proceedings are similar to probate proceedings in most states.

Annuity Trust, 709 So.2d 662 (La.1998). Second, probate proceedings were commenced in Harris County, Texas. The case was tried to a jury and a verdict returned. Judgment was originally entered on August 15, 2001, with Amended Judgments entered on October 15, 2001 and December 7, 2001. Several motions for entry of an amended judgment were filed just before the judgment was to become final on January 7, 2002. On January 11, 2002, the Texas probate court denied those motions. Under Texas law, the judgment became final on February 11, 2002. On February 21, 2002, the bankruptcy court held that parts of the judgment in the Texas probate proceedings violated Vickie's discharge under the bankruptcy code, and was obtained only after J. Howard's youngest son, E. Pierce Marshall (Pierce) misrepresented to the bankruptcy court which claims he would pursue in the Texas Probate proceeding. *Marshall v. Marshall (In Re Marshall),* 273 B.R. 822 (Bankr.C.D.Cal.2002) *(Marshall V).* Third, on January 25, 1996, a few months after J. Howard's death, Vickie filed for Chapter 11 bankruptcy here in the Central District of California.[3] This bankruptcy case engendered two adversary proceedings with which this Court has had involvement.

In January 1998, Vickie filed an adversary complaint against Finley Hilliard as trustee of the J. Howard Marshall, II Living Trust and as executor of the succession of J. Howard Marshall, II. On July 22, 1998, the Honorable

[3] The bankruptcy court noted in one of its decisions that Vickie apparently filed for bankruptcy because, after not receiving an inheritance from J. Howard, she lacked money and also because a default judgment had been entered against her on claims brought by her former personal assistant or housekeeper. This claim subsequently settled.

William D. Keller issued an order withdrawing the reference to the bankruptcy court of this proceeding, which thereafter proceeded before Judge Keller. On March 10, 1999, Judge Keller stayed the proceeding, pending the outcome of either the Texas probate proceedings or the present adversary proceeding, which is the subject of this order (the Adversary Proceeding). On November 2, 1999, the proceeding was transferred to this Court. That proceeding remains stayed.

The matter currently before the Court commenced on May 7, 1996, when Pierce filed an adversary complaint seeking a determination that Vickie owed him a debt that was nondischargeable. Pierce alleged that Vickie had defamed him when, prior to the time she filed for bankruptcy and with her complicity, some of her lawyers told members of the press that Pierce had used forgery, fraud, and overreaching to gain control of J. Howard's assets.[4] On June 11, 1996, Pierce filed a proof of claim in the bankruptcy case. He made the claim by attaching a copy of the complaint from the adversary proceeding.

Vickie responded to both the adversary complaint and the proof of claim. On June 14, 1996, she answered the Adversary Proceeding complaint, asserting, in part, truth as a defense. She also asserted counterclaims for fraudulent transfer, an injunction, conversion, tortious interference, breach of fiduciary duty, abuse of process, fraud, promissory estoppel, breach of contract (third-party

[4] Debts based on "willful and malicious injury," such as intentional torts, are not dischargeable. 11 U.S.C. § 523(a)(6). Damages for libel or defamation are not dischargeable when the statements were published with knowledge of their falsity. *Wheeler v. Laudani,* 783 F.2d 610, 615 (6th Cir.1986).

beneficiary), the imposition of a constructive trust, an accounting, and indemnity and contribution. As to Pierce's proof of claim, Vickie filed an objection on July 3, 1996.

After the case had gone through significant discovery disputes, Pierce filed a motion to withdraw the reference to the bankruptcy court of the Adversary Proceeding on September 22, 1998. That motion was assigned to Judge Keller for determination. Judge Keller issued a ruling on October 21, 1998 withdrawing the reference, but retaining the services of the bankruptcy judge for discovery purposes. On March 10, 1999, Judge Keller vacated the order withdrawing the reference, effectively returning this matter to the bankruptcy court.

On November 5, 1999, the bankruptcy court granted summary judgment for Vickie on Pierce's Adversary complaint. It found that Vickie had published no statements about Pierce, had not ratified any statements about Pierce made by her attorneys, and was not otherwise vicariously liable for any statements her attorneys had made about Pierce. Thus, the bankruptcy court held that Vickie had not committed a willful or malicious act under 11 U.S.C. § 523(a)(6).

Vickie's counterclaims against Pierce went to trial in the bankruptcy court in the fall of 1999. Approximately ten months later, on September 27, 2000, the bankruptcy court issued a Memorandum of Decision Following Trial (Original Decision). The Original Decision held that Pierce tortiously interfered with Vickie's expectation of the inheritance she otherwise would have received if she had exercised her right to a widow's election. On October 6, 2000, the bankruptcy court issued an Amended Memorandum of Decision Following Trial (Amended Decision),

which superceded the Original Decision. *See Marshall v. Marshall (In re Marshall),* 253 B.R. 550 (Bankr.C.D.Cal.2000) *(Marshall I).* The Amended Decision concludes not that Pierce tortiously interfered with Vickie's expectation of an inheritance, but that he interfered with her expectation of an *inter vivos* gift. *Id.* at 553. This was based, in large part, on facts found against Pierce as sanctions for discovery abuses, in addition to the evidence at trial. The bankruptcy court awarded Vickie $449,754,134 in damages. *Id.*

Pierce again filed a motion to withdraw the reference to the bankruptcy court. *See* 28 U.S.C. § 157(d). The case was randomly assigned to this Court for determination. On November 21, 2000, just prior to argument on that motion, the bankruptcy court issued a third order. This decision, the Supplemental Memorandum of Decision Following Trial (Supplemental Decision), does not supercede the Amended Decision, but instead supplements it by explaining that the bankruptcy court had determined that Vickie's counterclaims were core proceedings and by imposing punitive damages of $25 million.

This Court heard oral argument on Pierce's motion to withdraw the reference on December 11, 2000 and then took the matter under submission. The motion was later denied in this Court's Amended Order Regarding Subject Matter Jurisdiction. *See Marshall v. Marshall (In re Marshall),* 264 B.R. 609, 618 (C.D.Cal.2001) *(Marshall III).*

On December 29, 2000, the bankruptcy court entered a final judgment in this matter. *See Marshall v. Marshall (In re Marshall),* 257 B.R. 35 (Bankr.C.D.Cal.2000) *(Marshall II).* Pierce appealed that judgment to this Court.

In April 2001, this Court issued an Order Regarding Subject Matter Jurisdiction holding that the probate exception to federal jurisdiction did not apply, and therefore this Court did have subject matter jurisdiction, but finding that the matter was a non-core, "related to" matter pursuant to 28 U.S.C. § 157(c). Accordingly, the Court deemed the bankruptcy court's Amended Decision and Supplemental Decision as proposed findings of fact and conclusions of law pursuant to 28 U.S.C. § 157(c)(1) and began to undertake a de novo review of the record submitted in this matter. Both parties requested that the Court certify the matter for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). On June 19, 2001, the Court entered an amended decision, certifying the matter for interlocutory appeal. *Marshall III,* 264 B.R. at 633. The parties filed cross-motions for leave to file an interlocutory appeal with the Ninth Circuit, which the Ninth Circuit denied.

On August 27, 2001, this Court held a status conference on the matter and set a schedule for hearing additional evidence. On October 5, 2001, this Court held a hearing on the evidentiary sanctions imposed against Pierce for discovery abuses. In a minute order of that date, the Court found that discovery abuses had taken place, but held in abeyance its decision on sanctions pending this order. In addition, the Court ordered Pierce to produce to Vickie in California several hundred boxes of documents previously withheld. On October 23, 2001, Pierce produced more than 400 boxes of documents to a document repository stipulated to by the parties in El Segundo, California.

On November 2, 2001, Pierce filed a motion to dismiss or alternatively for summary judgment based on *res judicata.* The Court heard arguments on December 11, 2001 and on December 21, 2001, denied Pierce's motion.

Marshall v. Marshall (In re Marshall), 271 B.R. 858 (C.D.Cal.2001) *(Marshall IV).*

Beginning on December 11, 2001, this Court heard evidence in the Adversary Proceeding. The Court heard live testimony from Harvey Sorensen, Edwin Hunter, Jeff Townsend, Vickie Lynn Marshall, and E. Pierce Marshall. The Court also reviewed numerous video and audio tapes, substantial documentary evidence not previously available, evidence and testimony offered by Pierce that the bankruptcy court had excluded as sanctions for Pierce's discovery abuses, and evidence adduced during the Texas probate proceedings. Additionally, the Court reviewed volumes of testimony from depositions and previous court proceedings submitted by the parties. On January 8, 2002, the Court heard argument of counsel and took the matter under submission.

SANCTIONS

A substantial portion of the findings proposed by the bankruptcy court were imposed against Pierce as sanctions for discovery abuses pursuant to Federal Rule of Bankruptcy Procedure 7037. *Marshall I,* 253 B.R. at 554 n. 5. On October 5, 2001, this Court heard argument on the matter and held in abeyance its decision, pending a further showing of discovery abuse in light of the Court's order requiring the production of documents and a showing of prejudice by Vickie. After hearing evidence, the Court is able to make a determination of this matter on the merits and therefore does not reach the issue of evidentiary sanctions under Federal Rule of Civil Procedure 37(b)(2)(A). Therefore, except to the extent set forth

in Footnote 17, the Court makes no findings on the issue of sanctions at this time.

FINDINGS OF FACT

I. THE LIFE OF J. HOWARD MARSHALL, II

J. Howard's autobiography, *Done in Oil,* harkens back to a nostalgic period in American history of allegedly self-made entrepreneurs who shaped our country. It recalls a time when the saying "go west young man" was the siren song for men and women of our country who left humble beginnings and crossed the rivers and plains to settle huge expanses of the nation. These ruggedly honest individuals walked the Oregon Trail, settled the Oklahoma territories, worked the California gold fields and inspired phrases like "Remember the Alamo," which needs no explanation to Americans. The myths and the reality of these individuals of character and vision survive and now form a large part of our country's history and folklore. J. Howard set himself in the context of these enterprising pioneers. Both parties have argued that to understand this case, the Court must understand who J. Howard was and who Vickie is. At the outset, the Court admits to being uncomfortable with testimony that delved so intimately into their private lives. However, after a thorough review of the bankruptcy court's record and the testimony heard by this Court, the parties are correct to emphasize the particular nature of the individuals involved. The Court will therefore set forth some insights into the myths and reality of J. Howard and Vickie.

A. Background

Born in 1905, J. Howard attended private schools in the northeast part of the United States, including the George School, an exclusive New England prep school, Haverford College, an elite liberal arts college, and Yale Law School, one of the nation's leading law schools, from which he graduated *magna cum laude* in 1931. Although he often derided his undergraduate liberal arts education, he took great pride in the legal training he received at Yale. Upon graduation, he worked as an associate in a New York firm for two years. Subsequently he returned to Yale Law School to teach and later became the Assistant Dean.[5]

In the 1930's, J. Howard worked for the Roosevelt Administration on the proration of oil production. During World War II he continued to work on petroleum supplies and logistics, serving on the government petroleum board.

After the War, J. Howard moved to Ashland, Kentucky and became president of Ashland Oil Company. He subsequently became Vice President of Mid-Continent and by the mid 1950's he was working for Signal Oil in California. In 1954, J. Howard was one of the founders of Great Northern Oil and Gas Company. The initial stockholders were Woodley Petroleum, Southern Production, Sylvester Dysone and J. Howard. The wealth of the Marshall family is primarily based on the interest acquired by J. Howard

[5] One of the subjects he taught at Yale was wills and trusts. Surely he did not realize at the time that these same subjects would take up large portions of his later life, and dominate his family's affairs for more than six years after his death.

in Great Northern Oil and Gas, the predecessor company to Koch Industries.

B. First Marriage

J. Howard met and married his first wife, Eleanor Pierce Marshall (Eleanor)[6] in the 1930's. Their marriage produced two children, J. Howard Marshall, III (J. Howard, III) and Pierce.

Eleanor has been described to the Court as a refined, gentile, spiritual, and religious woman. In her sixties, well after her divorce from J. Howard, Eleanor became a minister. Now ninety-seven years old, the Court was told the story that when she was being deposed in one of these related matters, she inquired of counsel how long the deposition would last, because she did not want to miss her dancing lessons later that day. Eleanor was the primary care-giver for Pierce and his older brother due to the absenteeism of J. Howard as he pursued his business ventures.

The older brother, J. Howard, III, has been described to the Court as a true scholar. He attended Cal Tech and graduated at the top of his class. J. Howard, III formed a company in Los Angeles immediately following graduation and has remained a southern California resident throughout his lifetime. J. Howard was immensely proud of J. Howard Marshall, III but disinherited him over a financial disagreement involving the buy-back of Koch stock, *see* Part I.D, *infra*.

[6] Eleanor later re-married and is now Eleanor Stevens.

Pierce attended a military academy in Indiana and Webb School in Claremont, California. Subsequently he attended Pomona College, graduating in 1961. Following graduation he worked briefly in Michigan and then served in the Navy from 1963-65. He married in 1965 and he and his wife have been married for over thirty-five years. Pierce worked in California and New York as an investment banker until he moved to Texas in 1968 at the urging of his father. J. Howard wanted Pierce to become involved in oil and gas ventures. Neither Pierce nor J. Howard Marshall, III had spent much time with their father while growing up and the significant bond between Pierce and J. Howard seems to have developed during Pierce's years in Texas working with his father. Throughout the remainder of the 1960's and 1970's Pierce and J. Howard invested together in businesses which ranged from oil and gas to restaurant ownership.

In 1961, the thirty-year marriage between Eleanor and J. Howard dissolved. J. Howard was fifty-five years old at the time of the divorce, and at that time, two trusts were created to hold J. Howard's and Eleanor's now separate property interests. Trust B was formed on behalf of Eleanor and Trust S on behalf of J. Howard. However, Eleanor left her financial affairs in the hands of her former husband because she trusted his business acumen.

C. Second Marriage

In December 1961, J. Howard married Betty Bohannon Marshall (Betty). At his father's request, Pierce served as the best man. There are no children from this marriage.

Betty and J. Howard had met in the mid-1930's. She has been described to the Court as strong, intelligent, street smart, astute in business, and a good match for J. Howard. J. Howard Marshall, III always believed that his father had a long-term relationship with Betty during his marriage to Eleanor.

In 1961, J. Howard accepted the Presidency of Union Texas and he and Betty moved to Houston. When most people are planning for retirement, J. Howard was continuing the pursuit of the business that had been the focus of his life.

J. Howard created what he referred to as a "new community" for he and Betty. Although not formalized until years later, to J. Howard, this new community always existed. It consisted of any assets that he and Betty acquired during their marriage, even if they could be traced back to his own separate property.

In the early 1980's Betty was diagnosed with Alzheimer's disease. Her condition slowly deteriorated until her death in the Fall of 1991.

D. Koch Industries and the Disinheritance of J. Howard, III

Koch Industries (Koch) is a privately held, integrated petroleum and chemical conglomerate headquartered in Wichita, Kansas. Koch is estimated to be the second largest privately held company in the United States based on revenues of approximately $35 billion dollars. Koch Industries is unique among privately held companies in that it pays out a low dividend and instead reinvests its funds in order to grow the company. To that end, Koch

Industries has been an unqualified success, growing at dramatic rates over the last two decades.

Koch's history can be traced back to Great Northern Oil and Gas company, which formed in 1954 with J. Howard owning 16%, Southern owning 40%, Woodley owning 40% and the remaining percentages owned by minority shareholders. Subsequently, Fred Koch purchased Southern's 40% interest in Great Northern. Woodley eventually sold its interest to Pure which subsequently sold to Union Oil. Union Oil then sought to take over Great Northern, and merge it into Union Oil, making it a publicly traded company. J. Howard and the Koch family prevented the takeover.

Fred Koch and J. Howard shared the same ideas about business. Their belief was that earnings should be reinvested in the company to create sustained growth. They also believed their company should be privately held. To them, the management advantages of a privately held company outweighed short-term benefits of going public and making a quick profit in the public market. They wanted to be able to make quick business decisions without being encumbered with the need for shareholder approval, which was time consuming and often divisive. They also did not want to be subject to yearly shareholder demands for high dividend returns. This private business philosophy has been steadfastly adhered to for decades.

The Koch family eventually bought out Union Oil's interest and changed the name to Koch Industries. Fred Koch chose his son Charles Koch to take over as president of Koch Industries. J. Howard promised Fred Koch that he would always support Charles Koch and support keeping

Koch Industries a privately held company. Since the late-1960's, Charles Koch has been Chairman and CEO of Koch Industries. On his death, Fred Koch left equal shares of his voting stock in Koch Industries to his four sons, Charles, David, Bill, and Fred Jr. (Freddie).

In 1974, J. Howard Marshall, III wed in Los Angeles. At the reception J. Howard gave each of his sons 4% of the voting common stock. Although legally he would have no voting rights, J. Howard believed he could still control this 8% minority voting right through J. Howard, III and Pierce. Upon giving his sons the stock, J. Howard said: "Boys, these are the Crown Jewels, take care of them."

A disagreement erupted in 1980 between the children of Fred Koch about the future of Koch Industries. Bill and Freddie Koch believed that the best approach was to go public. Charles and David Koch, however, knew that their father would want the company to stay private. A fight for control of the family business ensued.

Freddie and Bill and their allies could count 48% ownership in the company, just short of the majority that they would need to install a new board that would approve a public offering. To find the extra votes, they looked outside the family. Freddie and Bill approached Pierce, now the owner of 4% of the voting stock, and asked him to vote with them, but he declined. However, when Bill and Freddie approached J. Howard, III, he sided with them, giving them the votes needed to oust the old board, including J. Howard. As far as J. Howard, III was concerned, it was time to go public.

When J. Howard heard about this, he felt betrayed. J. Howard had shared the vision of a privately held company and its virtues with Fred and Charles Koch. It can be

safely said that he believed that J. Howard, III should never go against the family. J. Howard flew to California to try to change his son's position, but was unable to convince him. J. Howard then made J. Howard, III an offer to buy back the stock for $208 per share, a total of $8 million.

J. Howard took this action despite the fact that he viewed the purchase price as exorbitant. The previous highest transaction for Koch stock had been $80 per share between Koch and its employees. J. Howard felt that he had been forced to pay a premium to obtain this stock from his own son.

Because the dividends could not cover the financing for the $8 million transaction, J. Howard sold the stock back to the company. He had honored his commitment to his friend, the late Fred Koch, but it would have immediate consequences within his own family. J. Howard flew back to Houston and disinherited his eldest son. He considered the $8 million payment an early inheritance and planned to give him nothing more.

With J. Howard's faction firmly in control again, Koch Industries resolved to stay private. At Charles Koch's urging, Koch Industries bought out the stock of the dissident shareholders. The effect of this buyout was that the remaining shareholders' ownership interest nearly doubled. The Koch family (primarily Charles and David Koch) now own more than 80% of Koch's common stock and 88% of its voting stock. The buyout, however, would engender more troubles. Led by Bill and Freddie Koch, the dissident shareholders sued Charles and David Koch, J. Howard, Pierce, and the remaining Koch shareholders. They contended that the price that they received in the buy-out

was far below the true value of Koch Industries. Major litigation over billions of dollars commenced.

Charles Koch stated publicly and in sworn testimony that there are no present plans to go public. The Court accepts these representations. His father was dedicated to maintaining Koch as a privately held company and Charles Koch has remained steadfast in adhering to this goal. Market conditions may eventually force this company to go public, possibly to pay estate taxes. But as of this date, the longevity of this commitment to remain a private company, the lengthy and factious family dispute between Charles Koch and other family members who wanted to take the company public, and Charles Koch's testimony convinces the Court that going public is not a pending or planned event.

Due to the dispute over Koch's true value, reducing the apparent value of Koch Industries became an important goal for Koch shareholders, including Pierce and J. Howard.

E. J. Howard's New Estate Planning

In 1982, J. Howard embarked on an estate plan to make certain that the Koch stock would never be held hostage. His eldest son was completely excluded as an heir. A comparison of his 1979 will with his 1982 will demonstrates his intent to exclude his eldest son and leave Betty, and upon her death, Pierce, as his heirs. (Ex. 3203.) From 1984, Pierce was the ultimate beneficiary of J. Howard's estate. J. Howard employed attorney Harvey Sorensen to represent him and the various entities he created for his estate plan. He also asked Pierce to assist Sorensen in the creation of these entities.

On July 1, 1984, the company known as Marshall Petroleum, Inc. (MPI) was formed by J. Howard, Betty, and Eleanor in a Section 351 tax-free exchange of property for stock. MPI's assets comprised the separate property of J. Howard from Trust S, the separate property of Eleanor from Trust B, and Betty's share of her and J. Howard's "new community." In May of 1991, the company elected S-Corporation status.

At its formation, J. Howard owned 56% of MPI, Eleanor owned 37%, and Betty owned 7%. In 1989, Eleanor decided that she wanted to increase her charitable giving. She then established a Charitable Remainder Trust, with Pierce as the ultimate beneficiary, and sold a portion of her MPI stock back to the company for cash. In 1991, Betty died and her ownership passed to J. Howard and subsequently to Pierce. Over this time period, Pierce bought stock in MPI and received stock as compensation for his consulting services. By 1992, the ownership changes resulted in J. Howard controlling approximately 70% of MPI.

The main asset of MPI was J. Howard's Koch stock. Upon forming MPI, J. Howard transferred to MPI his Koch stockholdings. Although he hoped that MPI would become an active oil and gas company in its own right, and indeed for some time it was involved in various oil and gas deals, its only real purpose by the time J. Howard died was as a holding company for Koch stock. Through the veil of a corporation, J. Howard sought to protect his Koch stock, and pass it on to Pierce while avoiding as much estate tax consequences as possible.

The evidence reflects the number of Koch shares that MPI held. The Texas Commerce Bank required collateral

for a line of credit for MPI. The presentations to the Texas Commerce Bank Loan and Discount Committee, which were made while J. Howard was alive, state that J. Howard, through MPI, owned 862,535 shares of Koch stock. (Ex. 685.) The same documents indicate that MPI had pledged 505,885 shares to Texas Commerce Bank as collateral. Koch issued and had outstanding 5,850,908 shares of common stock. The 1995 Presentation lists J. Howard's percentage ownership as 14.7% based on his ownership of 862,535 shares of the 5,850,908 shares of Koch common stock as of December 31, 1994. (Ex. 685.)

The 1995 and 1996 Credit Approval Presentations state that "the bank does not receive financial statements on Marshall Petroleum and thus the dividend income that MPI receives from Koch stock is relied upon for repayment of bank debt. The Company [MPI] received dividend income of $8MM and $7MM in 1995 and 1994, respectively." The report notes that as a privately held company, access to Koch's audited financial statement is limited and that historically the bank received updates of Koch's financial performance from Pierce. (Exs.684, 685.)

F. J. Howard's Affair with Lady Walker

In 1982, J. Howard met "Lady" Diane Walker. Feeling the need for a drink after a day at the office, he went to a "strip joint, a titty bar" as he described it in his videotaped deposition in 1992. (Ex. 3225.) Lady Walker was one of the strippers who took everything off for J. Howard in return for his generous dollar bills. Thus, at the age of seventy-eight, he began his pursuit of Lady Walker.

J. Howard wanted Lady Walker to be his exclusive mistress and he often professed his desire and commitment to marry her if Betty died. Money was immediately bestowed upon her. The intensity of his pursuit is set forth in his letters to her.

These letters contain repetitive and aggressive protestations of his love, always coupled with a reference to money.[7] "Jungle Money" and "Pin" are code words for money that J. Howard gave to Lady Walker. "Pin" was a regular payment made on a consistent and timely basis,[8] "Jungle money" was a payment for her own pleasure,[9] and "big kills" were larger sums given sporadically to Lady Walker.[10] J. Howard also gave Lady Walker enormous amounts of jewelry, including more than $1 million purchased from Harry Winston and Nieman Marcus, the same

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[7] "Light of my life/ . . . Now, as always you can count on/my love and devotion – our 'Jun'/money is but a small sample of my concern for my lady – . . . " (Ex. 630, p. HBOM 0015501.)

" . . . my proposal to beg you to be my mistress." (Ex. 630, p. HBOM 0015502.)

"Dear Lady – /I fear I am a nuisance – I still hope I am a beloved nuisance – of course/I shall do what you ask 'stop calling' . . . it is part of the juice of my devotion . . . All of this is a far, far cry from the years gone by . . . you said I could 'call you/whenever I wanted.' I fear I have abused it. If so, it is only because I love you . . . " (Ex. 630, p. HBOM 0015505.)

[8] "Dear Lady – /Perhaps true love never/runs smooth – but since I love you truly, this 'pin'/ tries to tell you I am/Your devoted man" (Ex. 630, p. HBOM, 0015479.)

[9] "Lady love: /Jungle & Pin" (Ex. 630, p. HBOM 0015481.)

"My Lady Love – /Increased Jungle Money – /+/Pin/+/Sharom" (Ex. 630, p. HBOM 0015483.)

[10] "Another 'pin' to go with/Big Kill" (Ex. 630, p. HBOM 0015486, H-108-1480.)

stores at which he would subsequently buy jewelry for Vickie.

At one point, J. Howard sent Lady Walker the Koch Industries prospectus in an apparent attempt to impress her with his wealth. The front of the first page reads, "For Lady – /The Crown jewels/ J. Howard." (Ex. 630.)

This pattern of giving money, and even the terms that J. Howard used, is the same pattern that Vickie describes of J. Howard's pursuit of her a decade later. Lavish jewelry, regular payments of money, and sporadic gifts ushered these bar dancers into J. Howard's life. Apparently, it was extremely lucrative to have an affair with J. Howard. J. Howard spent approximately $2 million a year on Lady Walker, which is approximately the same amount of money he spent each year on Vickie when he pursued her a decade later.

J. Howard's statement that "men in love do stupid things and I was sure guilty" is accurate. (Ex. 3225.) In J. Howard's case, it was a consistent pattern.

G. The Death of Betty Marshall and Lady Walker and the Beginning of the Lady Walker Litigation

J. Howard's affair with Lady Walker continued uninterrupted until she died suddenly as a result of complications from facelift surgery on July 9, 1991 at the age of fifty-one. The effect of her death on J. Howard was initially described by him as the most tragic thing that ever happened to him. Ironically, shortly after Lady Walker's death, J. Howard discovered that she had betrayed their relationship and had been living with another, much younger, man during most of their affair. Outrage drove J.

Howard to sue her estate in January 1992 seeking the return of almost $15,000,000 in gifts that J. Howard had given Lady Walker (the Walker Litigation). J. Howard accused Lady Walker of fraud, claiming she received kickbacks from merchants after the items were purchased and the merchants had charged J. Howard's account. Because J. Howard hated lawyers and disliked handling details, he appointed Pierce to deal with the details of the matter.

H. IRS Gift Tax Audits

In 1989, J. Howard's gifts to Lady Walker came to the attention of J. Howard's attorney Harvey Sorensen. Sorensen, a tax specialist, became concerned. J. Howard had never filed gift tax returns on the gifts, nor had he indicated any particular concern with doing so. J. Howard's position with respect to the gift taxes was largely similar to his position with estate taxes – he did not want to pay them and it was his lawyers' job to figure out how to avoid them.

Sorensen, however, understood that the gifts were subject to a gift tax that had gone unpaid, and knew that this avoidance of the tax laws would cause substantial interest and penalties from the Internal Revenue Service. Sorensen eventually determined that between $12 and $14 million was given to Lady Walker without taxes being paid. In 1989, he filed amended tax returns for the years 1983-87. These eventually caused the IRS to audit J. Howard and initiate tax collection proceedings.

J. Howard repeatedly attempted to avoid taxes, and during the gift tax litigation, it was discovered that he had, in fact, found a way to use his affair with Lady

Walker to his advantage. In the gift tax litigation, J. Howard took the unlikely position that his "pin" payments to Lady Walker were consulting fees. At one point, he suggested that she received a salary of $1 million per year to handle his public relation work. He not only tried to escape gift taxes this way, but it is likely that he deducted his payments to Lady Walker from his income tax returns.

His efforts to hide gifts in the guise of legitimate business operations were disclosed in the testimony of his closest advisors. Jeff Townsend testified that Finley Hilliard, J. Howard's accountant, told Townsend that J. Howard wanted to funnel funds to Lady Walker. Two corporations were formed, in part as a way for J. Howard to give Lady Walker money. Stock of Coliseum, Inc. was held in trust for her benefit and he gave her gifts of Presidio, Inc. stock. Lady Walker also served on the MPI Board of Directors. When questioned about her functions, he replied, "I guess she was a Director – never active – she never undertook anything as a Director." (Ex. 3225.)

In 1993, Sorensen was relieved of his responsibilities of representing J. Howard, after more than ten years of service. Pierce contends that the reason Sorensen was terminated was because he was not aggressive enough in the disputes with the IRS. However, this contradicts the characterization of J. Howard being fiercely loyal to his employees, who were in turn loyal to him. Sorensen was eventually replaced as J. Howard's lead tax counsel and estate planning lawyer by Edwin Hunter, whose approach to tax litigation was far more aggressive, and whose actions on behalf of Pierce Marshall have become the focal point of the present case.

J. Howard, his family, estate, and MPI became mired in numerous disputes with the IRS. Once again, J. Howard would call on Pierce to handle the details of the litigation. These disputes focused on two critical issues: (1) gifts given by J. Howard to his paramours and (2) the valuation of MPI, and therefore Koch, stock. Once again, the legion of lawyers working on behalf of J. Howard, his estate, and later Pierce, were faced with the quandary of the defending the valuation of MPI and Koch stock.[11]

Reducing the value of Koch and MPI stock had become the central organizing principle of J. Howard's legal team. There was no other goal. They sought to make J. Howard, who was considered one of the 400 richest men in the world and the wealthiest in the state of Texas, appear to be holding as his primary asset a minority interest in a company that had very little market value, despite being one of the largest and most successful oil conglomerates in the country. Failure to do so would cost J. Howard millions of dollars in disputes with the IRS.

Koch valuation was just as important to Pierce, who personally owned Koch voting stock, making him a party to the Koch valuation litigation. He also stood to inherit J. Howard's Koch interest and the valuation problems inherent in these tax disputes with the IRS.

[11] Disputes over gift tax and inheritance tax liability between J. Howard's estate and the IRS are still pending, and the IRS has agreed to keep a settlement offer open until this Court's proceedings are completed. The IRS may want to take a closer look at the summaries written on J. Howard's personal account, and passed on to his accountant, for illegitimate tax deductions.

I. Summary

It is fair to say that J. Howard was an immensely successful businessman. He served on boards of numerous corporations and banks and became involved with a number of oil and gas ventures in Texas. J. Howard was also heavily involved in Koch Industries, as described herein. J. Howard's success earned him a ranking in Forbes Magazine as one of the 400 wealthiest men in America, and the wealthiest man in Texas. But the rating rankled J. Howard, and he claimed to dislike the publicity that it brought. What worried J. Howard more than publicity was the spotlight that it shined on his wealth. Being named as one of the richest men in the country was likely to attract the attention of the IRS.

J. Howard was a well-trained lawyer. Oddly, however, he did not appear to have much regard for the profession. He was reputed to dislike lawyers and the details of lawyering. To his mind, a legal document should never be more than one page long.[12]

J. Howard is also described as being irascible and demanding. Perhaps to those who knew him, those personality traits were endearing. To outsiders, he was viewed simply as impatient and hostile. His tendency to bang the table to make his point was viewed as being in command of a situation. However, the Court's view is that, at least late in his life, J. Howard's theatrics were transparent.

[12] It is ironic then that his death has created the largest volume of legal filings in the history of the Southern Division of Central District of California.

In addition, J. Howard's disregard for the tax codes was a pattern he followed his entire life. For ninety years, he showed nothing but contempt for the IRS and the tax codes of this country. Throughout his life he surrounded himself with excellent legal counsel who were creative in attempting to circumvent the tax codes.[13] He ignored gift taxes until he could no longer evade the issue. He railed against the inheritance tax provisions, claiming that being forced to pay estate and income taxes was "double taxation," while at the same time he avoided paying substantial income taxes by: writing off as business expenses the gifts to his paramours Lady Walker and Vickie, whom he claimed were consultants; financing his lifestyle by taking a line of credit against his valuable stock holdings, the proceeds of which are not taxable income; and hiding and manipulating his assets in aggressive accounting gimmicks.

In summary, this court is not impressed with the character of a man who had the finest private school and legal education and who consciously avoided the very taxes that millions of American families comply with every year. It is in the collection of these taxes that the government must rely on the good faith and honesty of our citizens to fund our nation's needs in time of peace and war. The fact that J. Howard could not see fit to comply with these laws, despite the great advantages that he was afforded by American society, speaks poorly of his character.

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[13] Surprisingly, much what J. Howard managed to do was within the confines of the law, allowing him to evade taxes by stepping through loopholes that only someone of his great wealth could afford to find.

II. VICKIE LYNN MARSHALL

Vickie dreamed of becoming the personification of her idol, Marilyn Monroe. Both became international superstars, traveling far from home under assumed names. Norma Jean's fame thrust her into the arms of an American baseball icon and a dashing young politician, while Vickie Lynn found herself in the company of a Texas oil baron. But her notoriety never reached the same heights or longevity. Her life is best described as that of a person who was rescued by her wealthy pursuer and taught to spend money at a breathtaking pace that most Americans cannot fathom. While she detested being thought of as a gold-digger, her actions leave little doubt that money was the central facet of her relationship with J. Howard. Her appetite for money, once developed, was incessant and outlandish by everyday standards.

Vickie appeared before the Court to testify for three days. Her communication skills were poor as she frequently had trouble engaging counsel. Her illiteracy is striking. Examples are too numerous to chronicle but include writing "25.00" meaning $2,500 and "4500,00" meaning $4,500 – she testified that she has trouble with zeros. In fact, she has only recently started learning to pay her own bills after years of managers and relatives managing her money. Vickie also finds herself in difficult times and is being treated for depression.

But education is no guarantor of integrity and a discredited profession does not mean a person lacks truthfulness. While Vickie certainly drew a more noble image of herself than the facts bear out, her testimony on the statements made by J. Howard are credible.

A. Background

Vickie Lynn Marshall was born in Houston, Texas in 1967. Her parents divorced shortly after she was born and her father moved away. She never saw him until she looked him up after she had become Playmate of the Year. In her teens she moved with her mother to Mexia, Texas, a small town in the eastern part of the state. She completed grade school, but failed her freshman year in high school, and never progressed past an eighth grade education.

Vickie worked as a waitress and morning cook at Krispy Fried Chicken in Mexia where she met Billy Wade Smith, who was the cook at the restaurant. At the age of 17, she married Billy Smith, and at the age of 19, she gave birth to her son Daniel, her only child. The marriage ended shortly thereafter, and Vickie moved back to Houston with Daniel when he was a year old.

B. Career as a Dancer

At this point in her life, Vickie was estranged from her family. Her husband, Billy Wade Smith was not providing child support and made no effort to visit Daniel. Initially she found employment at Walmart and later as a waitress at the Red Lobster, but she could not make enough money to support herself and Daniel. Vickie testified that one day, while on the way home from work, she passed a neon sign that displayed a lady in high heels wearing a bikini. She was interested in becoming a dancer, but deferred at first when she found out it was a nude dance bar. She initially sought a job as a waitress but was quickly talked into dancing on stage. After a couple of drinks, humiliated but

willing to dance, she overcame her inhibitions and continued as a dancer when she saw "all the money in her lap which paid the bills."

Vickie, however, was big-boned, and in the fashion trends of the late 1980's and early 1990's, her figure relegated her to the "B" team. Instead of working the lucrative night shifts, Vickie danced during the day, for less pay and fewer tips. But this apparent disadvantage would soon work in her favor.

III. J. HOWARD'S AND VICKIE'S TIME TOGETHER

J. Howard and Vickie began their relationship in October 1991, when they met at Gigi's in Houston, Texas. They married June 27, 1994 and their relationship continued until his death on August 4, 1995. They met when she was at the vibrant age of twenty-four, and he a sickly eighty-six year-old man. The issues of J. Howard's donative intent and Vickie's expectancy can only be understood by slowly unwinding their years together.

A. The Meeting of J. Howard and Vickie

After Lady Walker and Betty died in 1991, J. Howard entered a period of deep despondency. He appeared to his family and friends to have lost his zest for life. In 1991, J. Howard told his eldest son, J. Howard, III, that "he enjoyed having pretty women on his arm when he entered the River Oaks Country Club in Houston and that a great light had gone out of his life."

In October 1991, Vickie was dancing at Gigi's, a Houston strip club. Dan Manning was J. Howard's driver who frequented Gigi's and had seen Vickie dance. Manning

and J. Howard had talked about going to a burlesque bar and in October, Manning drove his boss to Gigi's to cheer him up. Because of J. Howard's age and physical condition, he did not go out at night, and thus they arrived during the day-shift, when Vickie worked. Manning approached Vickie and asked her to dance for J. Howard. According to Vickie, when she saw J. Howard, "he looked terrible, he looked like he had lost his will to live." While Vickie danced, J. Howard tried to grab her breasts. Thus began J. Howard's aggressive pursuit of Vickie's affection. He asked [] her to have lunch with him the next day. A description of this lunch helps to understand the pattern that they followed for the years of courtship prior to their marriage.

B. The Courtship

J. Howard initially took Vickie to a restaurant hotel and ordered room service. He told Vickie about Betty and Lady Walker and funny stories about himself. When she became concerned about her job, he gave her an envelope with a thousand dollars in cash and told her not to go to work. The following day they had lunch at River Oaks Country Club, where once again she was given cash. On each occasion, money was given to her ranging in amounts of $1,000 to $5,000 in cash. Vickie "stopped dancing right after Howard met me that day." (Dep. of Vickie, Dec. 28, 1999, vol. 3, p. 600.) J. Howard was soon paying all of Vickie's bills. Shortly after they met, J. Howard purchased a white Toyota Celica as a gift for her after her own car had been repossessed.

She started receiving $2,000 checks twice a month. (Ex. 48.) These checks were recorded by J. Howard's assistant Eyvonne Scurlock for consulting, just as his

previous "pins" to Lady Walker had been. Summaries prepared by Scurlock were then sent to J. Howard's accountant for tax purposes and 1099 Tax forms for Vickie were prepared. (AP 11462, Dep. of Eyvonne Scurlock, August 27, 1999. pp. 72, 576-577.) These $2,000 checks increased over time to $2,750.

Within a week of their meeting, J. Howard told Vickie that he was going to marry her. He had been re-invigorated by Vickie. While he had fallen into a state of deep despair after the deaths of Lady Walker and Betty, his relationship with Vickie brought him back to life. He called her "the light of his life." He told his attorney Harvey Sorensen numerous times that he wanted to marry Vickie.

According to Vickie, J. Howard asked her to marry him "tons of times." She contends that the proposals were usually accompanied by the same assurance that once they were married, she would have half of everything he had. His proposals occurred frequently, and are confirmed by numerous friends, employees and professional associates. He started buying her rings that increased in size and value. When he gave her rings, there was always the same conversation about marriage. "It seemed like every time he would buy me a bigger and bigger ring and he would ask me over and over and over and he was very pushy. He really loved me. He just really wanted to marry me." (Dep. of Vickie, December 28, 1999, p. 642.) During J. Howard's courtship of Vickie, he purchased at least three large engagement rings as well as numerous smaller rings. On each occasion, the giving of these rings was accompanied by the same incessant matrimonial proposals.

J. Howard's aggressive pursuit is illustrated by one instance where he purchased jewelry for Vickie from Nieman Marcus. On Christmas Eve 1993, David Watson, a Nieman Marcus employee, delivered various pieces of jewelry to Vickie's home for her and J. Howard to review. Vickie looked at all the pieces, and commented that a particular yellow diamond ring was too expensive and should not be shown to J. Howard. When J. Howard arrived, he looked at the jewelry and commented: "this is better than the Home Shopping Network." J. Howard then asked if he had seen everything. Watson, forgetting Vickie's admonition, showed J. Howard the yellow diamond ring. When told that the price was, $107,000, J. Howard stated: "Oh, just a baquetta." J. Howard then completed the purchase. That purchase, and an earlier one by J. Howard in April 1993, were the two largest purchases in store history.

During their courtship, J. Howard made numerous other gifts to Vickie. On September 16, 1992, J. Howard purchased a ranch for Vickie in Tomball, Texas, outside of Houston (the Tomball Ranch). This ranch was purchased in the name of the J. Howard Marshall, II, Living Trust (the Living Trust), but was intended for Vickie's use and benefit. J. Howard later purchased a home on Rusington Street in Houston, which was held by the Houston Land Trust, with her as the beneficiary. J. Howard also rented the Los Angeles house that Marilyn Monroe had lived in. When the lease expired, he purchased a house on Ashdale street in the Brentwood area of Los Angeles for her. J. Howard also provided Vickie with an apartment in New York City when she spent time there. He bought her $10,000 gowns that could only be worn once because in "Hollywood you could never wear the same dress twice."

Jewelry purchases from Harry Winston jewelers for Vickie exceeded $2 million. In 1992, J. Howard purchased a new Mercedes Benz for Vickie.

Vickie testified that J. Howard taught her to spend money, and that spending money was fun. She was the second of two women with little wealth and no experience whom J. Howard taught that there were no limits to the fun of spending money if they were with him.

J. Howard eventually introduced Vickie to Pierce. On one occasion in 1992, J. Howard took Vickie and Pierce to lunch at the Royal Oaks Country Club. From the outset, the relationship between Vickie and Pierce was tense. Vickie already believed that Pierce did not like her, and felt that during the entire lunch he was giving her "mean looks." According to Vickie, when J. Howard went to the restroom, Pierce told her "don't let J. Howard buy you anything else."

J. Howard nevertheless repeatedly proposed to Vickie. She had just started taking voice and modeling lessons when she met J. Howard, and although she was flattered by these proposals, she wanted to have a career first. Vickie put off J. Howard almost three years before she finally accepted his proposals.

Shortly after they met, Vickie saw an ad in the newspaper to audition for *Playboy Magazine*. After meeting with a scout, Vickie was quickly hired and two weeks later was doing a test shoot in California. In March 1992, Vickie made her *Playboy* debut, appearing on the cover. In May 1992, she was named *Playboy* Playmate of the Month.

Vickie was contacted by Guess Jeans to be part of its national advertising campaign. She became their top

spokes-model for a one-year period from 1993-94. During this time, she appeared in numerous other magazines and in 1993 was named the *Playboy* Playmate of the Year. Vickie had achieved the level of international sex symbol, and was one of the most recognized print models in the world. Her stardom only encouraged J. Howard to pursue her with a newfound vigor.

In Spring 1994, Vickie was on tour for Guess Jeans in Singapore. While there, she and the Guess Jeans entourage were mobbed by fans. The incident scared her, and the remainder of the tour stops in Japan and the Philippines were cancelled. When she returned home to Houston, J. Howard once again proposed to her. J. Howard repeated that she was the woman who had saved his life, that he would take care of her and her son, and that she would have half of everything he had. This time, Vickie accepted.

Vickie testified that his money was a factor in her decision to marry J. Howard, but contends that she would have married him anyway. Vickie sought security for her and her son, and what he might lack in youth, vigor, and looks, J. Howard made up for with his great wealth. Although she has often been portrayed to the Court as a gold-digger and predator, she did hold a certain regard for J. Howard, and was willing to compromise her prime modeling years for someone who showered her with gifts and offered financial security.

C. The Marriage of J. Howard and Vickie

J. Howard and Vickie were married on June 27, 1994 at the White Dove Wedding Chapel in Houston, Texas. Although numerous prenuptial agreements had been

prepared, beginning as early as 1992, none were signed, nor was any such agreement ever discussed with Vickie.

The wedding was not widely announced, and Pierce did not learn of the wedding until after it occurred. Only a few close confidantes attended, including J. Howard's assistant Eyvonne Scurlock, his new driver Arnold Wyche, his nurse Charlotte Fade, and Vickie's aunt and uncle, Elaine and Melvin Tabers. Henry Schlesinger, one of the MPI executives was invited, but did not attend.

The night of the marriage, Vickie flew to New York on an assignment, leaving J. Howard in Texas. On July 6, 1994, J. Howard left for California to visit his new wife.

During their marriage, J. Howard continued to give extravagant gifts to Vickie. J. Howard also considered adopting Vickie's son Daniel. One of J. Howard's lawyers, Jeff Townsend began seriously investigating the issue. He contacted counsel in California about possible adoption proceedings and traveled to California to meet with attorney Lawrence Leone. (Ex. 143.) The adoption, however, never took place because Townsend determined that he would not be able to obtain consent from Daniel's natural father, Billy Wade Smith. The steps taken to begin an adoption proceeding demonstrate that J. Howard was prepared to undertake a greater commitment to Vickie and her son, not only during his lifetime, but long afterward.

Vickie and J. Howard also tried to have children of their own. Initially, they tried to have children in what Vickie described as "the normal way." When that did not work, J. Howard went to a fertility doctor to seek advice and treatment.

D. Post-nuptial estate planning changes

After J. Howard and Vickie were married, J. Howard's estate plan changed. Although his will was not changed at that time, the Living Trust was amended to become irrevocable. His interest in MPI was reduced until, by summer of 1995, he was stripped of all of his ownership interest in the company. These changes were made by a series of documents that are the heart of the claims of tortious interference, *infra*.[14]

E. Illness and Death of J. Howard

J. Howard traveled to Los Angeles in December 1994 to spend Christmas and New Year's with Vickie and Daniel. He and Vickie had, until that time, kept their relationship out of the public spotlight. They planned to make their relationship public at the New Year's Eve party at the *Playboy* Mansion in Beverly Hills.

J. Howard was overjoyed. His joy at being with Vickie is demonstrated by pictures of him with Vickie that Christmas. (Ex. 264.) Although Vickie appeared to have a pleasant Christmas Day, she spent most of the rest of the

[14] The primary documents that changed J. Howard's estate plan are, *inter alia*: the Grantor Retained Annuity Trust (GRAT) of August 1993; the sale of MPI stock to Pierce in exchange for a promissory note in August 1993 (the Pierce Note); the Amended and Restated Living Trust of July 13, 1994; the Assignment of the Pierce Note, purportedly dated June 1, 1994; the Promissory Note between J. Howard and MPI, purportedly dated June 1, 1994; the Pledge of Pierce Note to MPI, purportedly dated June 1, 1994; the Renunciation of Income Distribution from the Living Trust; the Donation of the GRAT to the Living Trust; and the Sale for Private Annuity of MPI stock.

time J. Howard was visiting hidden away in her separate bedroom.

After Christmas, J. Howard fell ill and returned to Houston, where he planned on picking up his tuxedo and seeing his doctor before returning to Los Angeles in time to attend the New Year's Eve party with Vickie. However, J. Howard's illness turned out to be pneumonia and he was hospitalized at the Park Plaza Hospital on January 1, 1995.

J. Howard returned home after his release from the hospital on January 13, 1995 but he never regained his good health. On January 23, 1995, Vickie returned to Houston from Los Angeles and found J. Howard in a deplorable state. She stayed up with him that night, and she and his nurse Charlotte Fade fed him chicken soup. Sometime in the early morning hours, J. Howard choked and his heart stopped. CPR was administered and J. Howard was rushed to the Spring Branch Hospital, where he stayed until February 9, 1995.

After this near-death experience, Vickie's dispute with Pierce began in earnest. Pierce had left instructions that J. Howard was not to be suctioned and Vickie was infuriated. She believed that Pierce had decided to let his father die. During J. Howard's stay in the hospital, Pierce refused to pay for her bills or give her any additional money. On February 4, 1995, Vickie went to Spring Branch Hospital at 2 a.m. to visit J. Howard. She brought along a friend of hers, Raymond Martino, a Hollywood producer. Martino videotaped Vickie and J. Howard together, presumably so that Vickie could use the tape in court – either of law or of public opinion. On another occasion, Vickie brought a tape recorder and sought to tape J. Howard. She

climbed into his bed, exposed her breasts and asked J. Howard: "Do you miss your rosebuds?" (Testimony of Letisha Hunt, Tr. of Tex. Probate Trial, Feb. 21, 2001, pp. 18-19.)

During this time, it was clear that J. Howard was dying. His attorney Jeff Townsend began making funeral arrangements and trying to determine who would take charge of J. Howard's body. (Ex. 650, p. 21929.)[15] On February 22, 1995, J. Howard again returned to Park Plaza Hospital, where he stayed until March 30, 1995. While there, J. Howard underwent gall bladder surgery. In the Spring of 1995, unbeknownst to Vickie, J. Howard was diagnosed with inoperable, terminal stomach cancer.

As his health deteriorated, the dispute between Vickie and Pierce intensified. Pierce believed that Vickie's bills were excessive and directed that all of Vickie's creditors contact her directly. He stopped paying for her expenses. Vickie sued in state court in Harris County, Texas for spousal support.[16] That litigation was soon followed by guardianship proceedings, where Vickie and Pierce both sought to be appointed guardian of the person of the ailing J. Howard. When J. Howard returned home, Pierce hired off-duty Houston police officers to guard J. Howard at his home. Although Pierce testified that these guards were

[15] Townsend's research proved prescient. The odiousness of the parties involved in this case was displayed when Pierce sought to have J. Howard cremated, while Vickie insisted he be buried in California. The Texas probate judge, seeking the wisdom of Solomon, ordered that the ashes be divided between Pierce and Vickie. *See* 1 Kings 3:16-28 (King James). Pierce and Vickie each took their half of J. Howard's remains.

[16] During this time period, Vickie had hundreds of thousands of dollars in her checking account.

hired only to insure J. Howard's safety, they appeared in situations where there was no danger of harm. Vickie was not allowed to visit J. Howard without the guards being present. Glenn Johnson, who the Texas probate court had appointed temporary guardian ad litem for J. Howard, testified that he too was not allowed to visit J. Howard without the presence of the guards. Johnson testified that the guards were intimidating and opined that they had been hired to prevent Vickie from visiting J. Howard. He believed that Vickie, who was in Houston frequently during June and July of 1995, wanted to see J. Howard more often, but would not go to J. Howard's home because of the guards. Pierce had reason to keep Vickie from seeing J. Howard, because, as detailed, *infra,* he was concerned that she might be able to get him to sign a new will or gift instrument.

Nevertheless, from April through July, Vickie visited or telephoned J. Howard on a nearly daily basis. Vickie's visits decreased in July 1995, when she spent some time in the hospital herself. On August 4, 1995, J. Howard died at the age of 90. He was survived by his two sons, his wife, and an unprecedented volume of litigation.

In sum, their lives were intertwined in need, driven by greed and lust. Nevertheless, the Court is convinced of his love for her. J. Howard referred to Vickie as the "light of my life," and the lady that saved his life. His relationship with her provided the happiest moments of his last few years. He considered Vickie his reason for living, and the joy that she brought him undoubtedly helped him live another four years. There is no question that he showered her with gifts, that he sought to protect her and provide for her.

The Court is more cautious about her love for him. J. Howard became Vickie's knight in shining armor. His help propelled her to the highest levels of stardom, something unimaginable for a girl from her background. She cherished the protection and security that he afforded her and the lavish gifts that he gave to her in order to win her affection. J. Howard used his money to get Vickie to fall in love with him, and in her own way, Vickie loved J. Howard.

IV. TORTIOUS INTERFERENCE

A. J. Howard's Donative Intent

Upon meeting Vickie, J. Howard immediately began bestowing numerous gifts upon her. As detailed *supra*, J. Howard gave Vickie millions of dollars worth of gifts in the form of cash, property, cars, and jewelry. Besides these gifts, however, the evidence demonstrates that J. Howard intended to give Vickie a gift that would provide for her once her modeling career was over and he had passed on.

In the fall of 1992, J. Howard's estate planning lawyer Harvey Sorensen began preparing for J. Howard's goal of wedding Vickie. At J. Howard's direction, he drafted a pre-nuptial agreement for J. Howard and Vickie. This agreement was presented to J. Howard on November 18, 1992. The draft pre-nuptial agreement was 58 pages. (Ex. 3242.) The draft agreement provided that Vickie would receive certain amounts of money upon the termination of the marriage by either death or divorce. Vickie was to receive $100,000 for each month that J. Howard and Vickie were married. Vickie was also to get an additional $5 million if she and J. Howard had a child together. Largely as a result of J. Howard's lingering bitterness from Lady

Walker's betrayal, J. Howard insisted that the draft agreement include a provision that if Vickie had intercourse with anyone other than J. Howard during their marriage, that her payment would be reduced by half. (Ex. 3342.)

J. Howard believed the draft agreement was too long. He insisted that legal documents be only one or two pages and he directed Sorensen to revise the agreement. But from this time forward, J. Howard adhered to his plan to make a substantial gift to Vickie. One of his last recorded statements is a tape recorded message to the Texas probate judge on May 26, 1995, where he states: "I want my wife [Vickie] to be supported by me." (Ex. 364.)

During this same time period, J. Howard turned to attorneys Edwin Hunter and Jeff Townsend, both of Lake Charles, Louisiana. He gave Hunter the draft pre-nuptial agreement that Sorensen had prepared and asked Hunter to prepare a new pre-nuptial agreement that was not so long. At this point, he set Townsend and Hunter to work on a parallel path as Sorensen.

At the same time, J. Howard was seeking other avenues to give gifts to Vickie. J. Howard directed Townsend and Hunter to prepare documents for a "Marshall Farms" corporation to run the Tomball Ranch that he had purchased for Vickie. (Ex. 58.) Additionally, he asked Hunter and Townsend to prepare documents for a "corporation for Vicky's [sic] business." (Ex. 58.) Through this, J. Howard intended to buy Vickie numerous gifts of clothing and jewelry that would help her develop her career and image in Hollywood. In order to make the corporation not appear to be a sham to the IRS, Vickie would sign an agreement for the corporation to have rights to exploit her

celebrity image through goods such as perfume and clothing, in exchange for salary from the corporation, another gift to Vickie. Vickie was to eventually receive the proceeds from these goods.

Finally, J. Howard directed Hunter and Townsend to draft a "catch-all" trust for Vickie. (Ex. 58.) As described, *infra,* this draft trust instrument was never produced to the Court. However, the circumstances under which it was drafted lead the Court to the inescapable conclusion that the "catch-all" trust was intended to be a document whereby J. Howard would transfer assets to Vickie, to be held in trust for her until after his death.[17]

On December 14, 1992, J. Howard and Townsend spoke about the plans for Vickie. Townsend primarily specialized in gas and oil leases, but was a confidant to J. Howard, and fulfilled many roles. The next day, he sent a letter to his colleague Hunter. It memorialized his conversation, and asked for a progress report. (Ex. 58.) It detailed the four things that J. Howard wanted done: a prenuptial agreement, the Marshall Farm corporation, the corporation for Vickie's business, and a "catch all trust." (Ex. 58.) Townsend's letter was a reminder to Hunter to get to work.

On December 22, 1992, J. Howard met with Pierce, Hunter, Townsend, and Sorensen to review these matters

[17] The Court finds that the evidence before the Court sufficiently establishes the existence of a draft "catch-all" trust instrument prepared by Edwin Hunter. However, if the evidence had not been sufficient, the discovery abuses in this case might have led the Court to deem this fact as established as a sanction. *See* Fed.R.Civ.P. 37(b)(2)(A); Minute Order of October 5, 2001 Re: Evidentiary Sanctions.

related to Vickie, as well as other pieces of ongoing litigation. (Ex. 3245.) Sorensen's handwritten agenda included four specific "VLS Proposals": a "Family Farm Corporation," a "Modeling Corporation," a Grantor Retained Income Trust, or "GRIT," and adoption.[18] (Ex. 3245.) The agenda also included the pre-nuptial agreement as a separate agenda item. (Ex. 3245.) Unsatisfied with the results his attorneys had produced up until that time, J. Howard turned back to Sorensen.

J. Howard again told Sorensen that he wanted to marry Vickie. He told Sorensen that he wanted to provide Vickie with half of his "new community." (Ex. 62.) Sorensen testified that:

> new community was Mr. Marshall's words. He obviously intended to make her a gift. Well it's important to him because he wanted to share with her something he had done . . . "I am going to make this Koch Industries greatly enhanced in value and I want her to share in my achievements."

(Tr. of Tex. Probate Trial, Nov. 2, 2000, p. 181.)

Consistent with his propensity to avoid taxes, J. Howard did not want to trigger any gift tax liability, but wanted the gift to be "legally enforceable." (Id.) J. Howard defined for Sorensen what he meant by "new community," a term that he had previously employed when married to

[18] This was not J. Howard's plan to adopt Vickie's son, which came about later. Instead, at the time, J. Howard was considering adopting Vickie, so as to avoid the generation skipping tax. Sorensen pointed out to him that Texas law might frown on the type of relationship he was having with his new "daughter."

Betty. (Id.) As he had done with Betty, J. Howard defined "new community" as the growth of all his assets, even if they were separate property, during the time he was married to Vickie.

In discussions with Sorensen, the two concluded that his principal asset was his interest in MPI, and therefore Koch Industries. (Ex. 62.) J. Howard believed that the growth in Koch Industries would come from its recent acquisition of the United Pipeline System, which he believed he had been instrumental in bringing about. (Id.) Although he did not plan to give her Koch stock outright, J. Howard was particularly interested in sharing with Vickie the fruits of that labor in the growth of the value of Koch stock.

J. Howard also made clear at that time that he wanted Vickie to have the benefit of the gift after he had passed away. J. Howard was aware that Vickie's career had a short life cycle. Although he could provide for her during his lifetime, he wanted her to have financial security and a comfortable retirement. J. Howard knew that Vickie had limited intelligence and experience. He would later call her "unteachable." Accordingly, he believed that some form of trust would be appropriate to provide for her after his death.

On his flight to Kansas the next day, Sorensen dictated a memo memorializing his conversation with J. Howard (the New Community Memo). (Ex. 62.) Sorensen and members of his firm researched the possibility of making such a gift to Vickie. Like all of J. Howard's lawyers, they ran into the dual problems of Koch stock valuation and Gift Tax liability. Indeed, because J. Howard was so much older than Vickie, a gift to her would also be

subject to the Generation Skipping Tax of 55%. Sorensen eventually determined that the gift could not take place at that time because of the tax liability.

J. Howard's tax concerns, however, were always a short-term problem. He planned to marry Vickie, and once he did th_re would be no tax liability for the Generation Skipping Tax or the Gift Tax. At one point, Hunter told J. Howard that he would solve all of his gift tax problems related to Vickie if he simply married her. Indeed, when J. Howard first told Hunter of his marriage to Vickie, he told Hunter that he had done so on Hunter's advice.

J. Howard's intent is also demonstrated by his interest in having children with Vickie. As noted *supra*, J. Howard seriously considered adopting Vickie's son Daniel. The adoption did not occur only because it became clear that Daniel's natural father would not give consent to the adoption. Moreover, Vickie and J. Howard attempted to have children of their own. J. Howard's intention to have children with Vickie demonstrates his interest in taking on substantially greater responsibilities toward Vickie and her children. These responsibilities would surely have included providing for his children's mother after he had passed away.

B. Vickie's Expectancy

J. Howard repeatedly proposed marriage to Vickie. On at least three specific occasions, J. Howard's proposals included specific promises of gifts to Vickie.

When the Tomball Ranch was purchased in 1992, Vickie was concerned about her right to the property because her name had been crossed out on the deed and

she was wary of Pierce. Vickie explicity recalls that J. Howard told her "he wanted to take care of me and my son and give us security and he promised me half of everything that he had, that he wanted to always take care of me and always have me taken care of because of his age and all." (Dep. of Vickie, Dec. 28, 1999, p. 612-622.) Vickie's testimony before this Court was nearly identical on this issue.

Her second explicit recollection of donative intent was the purchase of a new 1993 Mercedes. Vickie wanted to get the title in her name and J. Howard stated, "honey, don't worry about it. Once we are married, you will have half of everything that I have."

The third time J. Howard made an explicit promise to her was when she returned to Houston in June 1994, after having been mobbed in Singapore on her Asian tour. "He just told me – I think he was missing me real bad because I was gone for a full week. And he just – I believe that he missed me really bad and he asked me to please marry him and that he loved me and that I would have half of everything that was his. I would have security for me and my son; and so finally I accepted his proposal." Shortly thereafter, Vickie and J. Howard were married.

No evidence was produced to show that anyone other than Vickie heard these specific proposals. However, the Court is guided by life experience in making the rather unremarkable finding that most proposals are not trumpeted to the public or made in the presence of the family attorney, especially when the pursued object of matrimony has declined repeated proposals for nearly three years.

The privacy of J. Howard's proposals is corroborated by Harvey Sorensen. In March 1992, Sorensen had dinner

with J. Howard at the River Oaks Country Club. At that dinner, Sorensen met Vickie for the first time. When she arrived, J. Howard asked Sorensen to excuse himself while J. Howard and Vickie spoke. While secretly watching the couple, Sorensen saw J. Howard give Vickie a ring and an envelope which Sorensen thought had money in it. J. Howard's promises are also corroborated by his pattern of sharing his "new community" with his second wife Betty and his seeking Sorensen's aid in creating a mechanism to give Vickie one-half of his "new community."

Although Vickie believed that J. Howard promised her one-half of his fortune, the Court finds that J. Howard always intended to give Vickie only half of his "new community." J. Howard, who used his wealth to impress women, did not explain to Vickie that what he meant by "half" referred to the "new community." Such a statement would be far less impressive.[19] Furthermore, such a statement would have meant little to Vickie, who was not familiar with what J. Howard meant by "new community," and would not be capable of grasping the distinction. Vickie therefore accepted J. Howard's promise at face value.

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[19] The dichotomy of the statements is illustrated by two hypothetical proposals:

> "Dear Vickie, please marry me and I will give you one-half of our 'new community,' which is a term I have coined and define as the appreciation of my assets, which primarily consist of Koch Industries stock, which is held by a holding corporation I created called MPI, the shares of stock of which are held in a living trust, which I amend from time to time;" or
>
> "Dear Vickie, please marry me and I will give you half of everything."

C. Edwin Hunter's Credibility

Edwin Hunter appeared before the Court to testify from December 12 to December 17, 2001. Hunter is a member of the bars of Louisiana, Texas, and Washington, D.C. He attended Louisiana State University for both undergraduate and law school. He began his legal career by working for a New Orleans firm in 1968. He later moved to Lake Charles where he became the head of the tax and estate planning division, and later the president, of a local firm. Since 1986, Hunter has been practicing in his own firm in Lake Charles, Louisiana, which is currently called Hunter, Blazer & O'Dowd (the Hunter Firm). Hunter represented MPI, J. Howard, and a number of the various trusts, all of which are now controlled by Pierce. Besides estate planning, Hunter's primary work for J. Howard in the years immediately preceding his death related to the on-going tax disputes between J. Howard and the IRS, which included questions on the value of gifts given to Lady Walker and the value of both MPI and Koch Industries.

Hunter was central to J. Howard's estate planning in the years prior to his death. Although Harvey Sorensen had taken over representation of J. Howard's estate planning in the early-1980's, and was responsible for drafting J. Howard's original living trust, Hunter began doing estate planning work for J. Howard in 1992. By mid-1993, Hunter had supplanted Harvey Sorensen as J. Howard's primary estate planning counsel. Hunter was responsible for the drafting of a number of J. Howard's final estate planning documents including the Amended and Restated Living Trust of July 13, 1994. The bankruptcy court found that Pierce "conspired with Hunter . . ." in tortiously interfering with J. Howard's gift to

Vickie. *Marshall* I, 253 B.R. at 554. Obviously Hunter's credibility is therefore of utmost importance in determining the facts of the case.

For the reasons set forth below, the Court finds that Hunter lacks credibility as a witness. First and foremost, Hunter's lack of credibility was consistently demonstrated to the Court by numerous falsehoods made before the Court that were directly contradicted by documentary evidence in the case and, in some instances, by other witnesses on Pierce's side. Second, Hunter has several motives to distort the facts in this case: to cover up his wrongful conduct during the events that give rise to this case; to preserve a settlement offer from the IRS on the value of MPI and Koch Industries in the continuing gift tax litigation, in which he continues to represent the Marshall family interests, now managed by Pierce; and to endear himself to Pierce, who has inherited J. Howard's wealth, whom Hunter admits was one of his largest clients. Finally, Hunter's lack of credibility was demonstrated by dishonest actions and his apparent willingness to abuse the high standing of his close family members.

Hunter's false statements are detailed first. The statements include, but are not limited to the following:

1. *Hunter's statement that he did not draft a "catch-all trust."*

During the proceedings before this Court, Hunter was asked where the draft of the "catch-all" trust was. Hunter claimed that he did not know. At that point in the proceedings, counsel for Vickie argued to the Court that it should sanction Pierce for his discovery abuses by designating as established that such a draft trust existed and would have

been a mechanism to make gifts to Vickie. Hunter then stated that he "suddenly remembered" that the "catch-all" trust referred to a voting trust agreement for Compagnie Victoire. Hunter's "sudden" recollection, after six years of litigation in this matter is incredible on its face. Moreover, such a recollection is contradicted by the facts of the case.

On December 15, 1992, Jeff Townsend sent Hunter a letter urging him to finish his work on four documents related to Vickie, all of which were to be presented to J. Howard at a meeting later that month. (Ex. 58.) Those documents were a draft-prenuptial agreement, a family farm corporation, a modeling corporation, and a "catch-all" trust. Hunter's billing records indicate that he and other members of the Hunter Firm worked on the first three documents prior to his meeting with J. Howard on December 22, 1992. (Ex. 649, p. 4.)

Not only do Hunter's billing records show his work on the first three items referenced in Townsend's December 15, 1994 letter, but they also demonstrate that he and members of the Hunter Firm worked on the "catch-all" trust. On November 10, 1992, his partner Glynn Blazier had a "[t]elephone conference with Finley Hilliard and Jeff Townsend regarding proposal to create trust for estate planning purposes." (Ex. 649, p. 2.) Additionally, Hunter's billing records show that he had a telephone conference with Blazier regarding the same. (Ex. 649, p. 2.). Hunter and Blazier again held a conference on a proposed trust on December 16, 1994. (Ex. 649, p. 3.) And finally, Hunter's billing records show that Glynn Blazier drafted a trust document on December 21, 1994. (Ex. 649, p. 4.)

That work on a "catch-all" trust was undertaken is also corroborated by Sorensen's handwritten agenda for

the meeting with J. Howard, where he includes discussion of a GRIT, which was never produced. (Ex. 3245.)

Hunter claims that the term "catch-all" trust was used by Townsend because he was an oil and gas lawyer and thus did not understand the complexities of estate planning.[20] Townsend, however, as a corporate lawyer, would have been well aware of a voting trust and how it works, and would not mistakenly have referred to it as a "catch-all" trust.

Hunter further testified that the voting trust for Compagnie Victoire was necessary because Vickie was worried that she would not control the company because J. Howard owned all the stock. Thus, according to Hunter, a voting trust would assure her that she would control the company. Documents in evidence, however, show that Compagnie Victoire was not created until 1993 and that Vickie did not know of its existence until after its creation. Thus, Hunter could not have been preparing a document to ease Vickie's concerns about control of a corporation that she had no idea existed at the time. Moreover, the evidence shows that the voting trust for Compagnie Victoire was not put into place until several months later. Furthermore, the Court is quite confident that, based upon her limited intelligence and understanding of business affairs, Vickie would not understand the workings of a voting trust. Hunter later claimed that the "catch-all" trust was subsumed into Compagnie Victoire.

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[20] Townsend did, however, carry out several personal, estate related, legal services for J. Howard, including investigating the possibility of adopting Vickie's son.

Unfortunately, the Court must conclude that Hunter was untruthful. A draft "catch-all" trust was prepared, or, at the least, J. Howard directed Hunter to prepare one.

2. Hunter's statement that he did not know when the Fine Tuning Memo (Ex. 310a) was originally drafted.

In fact, Hunter knew full well that the Fine Tuning Memo was drafted on July 8, 1994. Hunter's billing records indicate that he drafted "Marshall post-matrimonial plan" on July 8, 1994. That corresponds with a statement in the Fine Tuning Memo that J. Howard had not told his children of his marriage to Vickie as of July 8, 1994. (Ex. 310a, p. 1.)

In the bankruptcy court, Hunter claimed that the "Marshall post-matrimonial plan" referred to in the billing records was the Amended and Restated Living Trust instrument dated July 13, 1994. (T2247.)[21] That was demonstrated to be false because Hunter's billing records indicate that Cherry Doucet drafted the Amended Living

[21] As a result of this perjured testimony, there are portions of the bankruptcy court's proposed findings of fact and conclusions of law which mistakenly refer to the Amended and Restated Living Trust as the Fine Tuning Instrument. Pierce's Amended Assignments of Error often quibble with the bankruptcy court's findings on the matter. (*See, e.g.*, Am. Assignments of Error ¶ 25: "There is no evidence that J. Howard ever saw or was informed of the contents of the Fine Tuning Document."; Am. Assignments of Error ¶ 27: "The Fine Tuning Document does not purport to change the provisions of the Living Trust. . . ."; *see also, e.g.*, Am. Assignments of Error ¶ 26, 28.) These contentions are the height of bad faith. *See* Fed.R.Civ.P. 11(b)(2), 11(b)(4).

Trust on July 11, 1994, after receiving instructions from Hunter. (Ex. 649, p. 103).

This is important because it shows that the July 13, 1994 Amended and Restated Living Trust was changed to comport with the goals set forth in the Fine Tuning Memo which was drafted July 8, 1994, and therefore the Court can gain insight into the changes to the Living Trust by reference to the Fine Tuning Memo.

3. Hunter's statement that the reference "mischief" in the Fine Tuning Memo did not refer to gifts for Vickie.

Hunter's Fine Tuning Memo states that his plans would leave "less for mischief (and Miss Cleavage)." (Ex. 310a, p. 12.) Although Hunter admitted that "Miss Cleavage" referred to Vickie, he denied that "less for mischief" referred to allowing J. Howard to have less money that he could give to Vickie. Instead, Hunter disingenuously claimed that the phrase meant less for unspecified "waste." This deception was intended to hide what Hunter's perceptions about J. Howard were and his efforts to strip J. Howard of his assets.

4. Hunter's statement that he did not cause the Assignment, Promissory Note, and Pledge (Exs.287-289), to be backdated.

The Assignment, Promissory Note, and Pledge all purport to be dated June 1, 1994. However, Hunter's billing records show that Cherry Doucet of the Hunter Firm worked on "revisions of pledge" on July 11, 1994. (Ex. 649, 103, # 7535.) There is no record of a meeting with Pierce or J. Howard to sign these notes on June 1, 1994,

nor are there records indicating that Hunter prepared these documents prior to June 1, 1994. Hunter's Fine Tuning Memo, which was drafted after J. Howard's June 27, 1994 marriage to Vickie, addresses these transactions and indicates that they should occur in the future. (Ex. 310a, p. 6, VII.A.4.)

In an attempt to explain away his billing records indicating that he had worked on these documents, Hunter furthered his dishonesty by suggesting that those records could refer to another pledge, but did not say what pledge that was, or show that it had ever been produced. Finally, Hunter suggests that maybe J. Howard and Pierce caused the documents to be backdated after they were delivered. However, the dates on the documents are all typed, not handwritten in.

5. *Hunter's statement that he did not cause the donation of the GRAT to the J. Howard Marshall, II Living Trust to be backdated.*

The act of donation document purports to be dated January 13, 1994. Hunter testified that he did not backdate the document. That is contradicted by Hunter's Billing records which indicate that on July 12, 1994, Cherry Doucet of the Hunter Firm "[d]rafted donation of interest in GRAT." The January 1994 date is printed like the rest of the document.

6. *Hunter's Statement that Pierce was never shown the Fine Tuning Memorandum (Ex. 310a).*

Hunter's billing records for July 8, 1994 indicate that he drafted the Fine Tuning Memorandum and faxed it to

Pierce. (Ex. 649, p. 102.# 7662.) ("Draft Marshall post-matrimonial plan; fax to E. Pierce Marshall. . . ."). This contradicts his statement of loyalty to J. Howard and demonstrates that he was working on Pierce's behalf.

7. *Hunter's statement that he researched annulling J. Howard's marriage to Vickie to defend J. Howard from any actions taken by Pierce.*

Hunter said that J. Howard told Hunter that he was very much in love with Vickie. Hunter, however, began researching annulment in the Fine Tuning Memo. Hunter testified that the reason he began researching annulment is that he was concerned that J. Howard would ask him if Pierce, holding J. Howard's power of attorney, could seek to have J. Howard's marriage annulled. This is completely inconsistent with Hunter's testimony that Pierce always followed his father's orders. Neither Hunter nor J. Howard would be concerned with Pierce seeking to annul J. Howard's marriage to Vickie if Pierce respected his father's decisions and never interfered with J. Howard's relationship with Vickie. Hunter was therefore either lying as to the degree of control exercised by J. Howard over Pierce, or, as the Court finds, as to whom Hunter was preparing the Fine Tuning Memo for.

8. Hunter's statement that he believed, in May 1995, that J. Howard would live for 5 years.

This is relevant because on May 26, 1995,[22] J. Howard allegedly approved two documents which changed his estate plan. By the first document, the J. Howard Marshall, II GRAT, created in August 1993, sold back to MPI 47,288 shares of MPI. (Ex. 3376.) The other document was for sale of 63,051 MPI shares to MPI for a private annuity. (Ex. 3770.) Neither of these annuities were scheduled to make payments to J. Howard until March 1996. Hunter, like Pierce, testified that these annuities would have been economically beneficial to J. Howard had he lived for another five years. Hunter testified that he believed at the time that J. Howard would live for another five years. This is pure fiction.

In May 1995, J. Howard was already ninety years-old, and even reference to actuarial tables would suggest that he had less than five years to live. In fact, a year earlier, Hunter had done just that, finding that at 89, J. Howard had less than five years to live. (Ex. 310a, p. 7-8.) By May 1995, J. Howard had spent a large part of the previous five months in the hospital. On January 24, 1995, J. Howard had been rushed to the Hospital after his heart had stopped, and was only revived after CPR was administered. Townsend testified that he began looking into funeral arrangements for J. Howard in January 1995. Townsend testified that J. Howard never regained a healthy appearance in 1995, and he several times believed that J. Howard was close to death. If J. Howard's

[22] This document may also have been backdated, *see infra*.

advanced age, his near-death experiences, the obvious breakdown of his physical health, his extended hospital stays, and his need for 24 hour nursing care did not make it clear enough to Hunter that J. Howard would not live for another five years, in Spring 1995, J. Howard's physician, Dr. Reed, had diagnosed him with terminal, untreatable and inoperable stomach cancer. In April 1995, Dr. Reed opined that J. Howard might have as little as three months to live.

9. Other actions that demonstrated Hunter's lack of credibility

The Court's judgment of Hunter's credibility does not rest merely on these specific lies, made under oath before this Court (some of which were lies that he had [] previously made before the bankruptcy court). The Court also finds that his central role in the plan to drain J. Howard of his assets, which was undertaken in part to prevent J. Howard from making a substantial gift to Vickie, undermines his credibility.

This Court is not the first to question Hunter's character. Besides the bankruptcy court, which found that Hunter had conspired with Pierce to alter documents and deprive Vickie of her intended gift, Harvey Sorensen's firm, Foulston & Seifkin, found Hunter's ethics questionable. On June 20, 1994, Andrew Wright[23] prepared a research memo for Harvey Sorensen to advise him on his professional responsibilities relating to what Sorensen believed was Hunter's "probable professional misconduct"

[23] It appears that Andrew Wright is another attorney in Sorensen's firm.

in altering the GRAT, as discussed in Part W.D.8.ii, *infra*. (Ex. 281, Memo p. 3.) According to Wright, Hunter had acted incompetently, disreputably, had refused to comply with tax regulations, and had done so with the intent to defraud. (Ex. 281, Memo pp. 5, 7.) Wright concluded that Hunter's conduct would be viewed by the Department of Treasury as "disreputable, intentionally fraudulent, and perhaps incompetent." (Ex. 281, Memo p. 7.) Wright recommended that Sorensen report Hunter to the relevant disciplinary bodies. (Id.)[24]

Finally, the Court is concerned that Hunter acted unethically in attempting to impress Pierce with his family's judicial prominence. Vickie's counsel argued that Hunter and Pierce were involved in planning to use these connections to gain an advantage in dealing with J. Howard's estate.

The Fine Tuning Memorandum prepared by Hunter includes statements that deal with estate planning once J. Howard had married Vickie. (Ex. 310a.) Up until Hunter drafted the Fine Tuning Memorandum on July 8, 1994, J. Howard had been co-trustee, along with Pierce, of the J. Howard Marshall, II Living Trust. On page 3 of that Memo, Hunter addresses concerns about how to choose a successor trustee upon J. Howard's death. On page 3, paragraph d, Hunter lists numerous options. The last of these is to "let longest serving federal judge in Texas

[24] While the Court has no information as to Sorensen's eventual actions, Foulston & Siefkin informed Pierce and J. Howard that they would not second-chair the tax litigation behind Hunter. Although no reason was given to the Court, the Court believes that Sorensen and his firm did so in a successful effort to disassociate themselves from Hunter.

appoint successor." (Ex. 649, p. 3.) This suggestion is out of place considering that state courts, not federal courts, are primarily responsible for probate matters. *See Marshall III*, 264 B.R. at 621. In the next sentence, Hunter's thinking becomes more clear: "[sidebar . . . my father is now the longest serving federal judge in the United States]" (Ex. 649, p. 3.) (Brackets in original.)

Hunter's father is the Honorable Edwin F. Hunter, Jr., Senior District Judge for the Western District of Louisiana, and as Hunter's Fine Tuning Memorandum indicates, he is the longest serving federal judge in Louisiana and the United States, having been appointed to the Bench by President Eisenhower in 1953.

When taken in context of the other events in this saga, Hunter's self-styled "sidebar" is not an innocuous note to himself. On the next line of the Fine Tuning Memorandum, Hunter's suggestion for the Living Trust was to "[p]ermit the trustee to re-situs trust if it gives an advantage." (Ex. 310a, p. 3.) Indeed, the Living Trust was later re-sited to Louisiana, where Pierce initiated succession proceedings. *See Howard Marshall Charitable Remainder Trust*, 709 So.2d at 662. Had Hunter's plans been followed through with, the longest serving federal judge in the state of the trusts' new situs, his father, would have been given authority to choose a successor trustee. There is no evidence before the Court that these thoughts ever evolved past the planning stages, or that Judge Hunter was even aware of his son's plan. However, these events demonstrate Hunter's apparent willingness to exploit his father's high position.

Vickie's counsel points out, however, that this is not the only instance where Judge Hunter is referred to in

connection with this matter. Vickie's counsel also argued that Hunter and Pierce were involved in attempting to solicit advice from a judicial officer. On January 27, 1995, Harry Winston sued J. Howard over a bounced check that he had written while purchasing jewelry for Vickie. Disputes arose between Vickie and Pierce, as J. Howard did not have the cash to cover the check. Pierce had been responsible for solving the problem and returning the jewelry to Winston. Vickie, however, never returned the jewelry, and Harry Winston sued. On April 22, 1996, Judge Audrey Collins of the Central District of California, issued findings of fact and conclusions of law in that matter, and entered judgment in favor of Harry Winston. This ruling upset Pierce. In response, Pierce sent a memorandum to Edwin Hunter, outlining numerous strategic alternatives for the Harry Winston case, as well as for Vickie's bankruptcy. (Ex. 431.)[25] Part 2.B of that memorandum details how Pierce and his lawyers could determine his options for legal recourse. Included is the following passage:

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[25] During the presentation of the case to the Court, several documents were made available to Vickie's counsel by Pierce, with Pierce reserving the right to object to them based on privilege. The Court has not relied on any document as evidence that is subject to a legitimate claim of attorney-client privilege. However, Exhibit 431 is potentially privileged communication from Pierce to his attorney Hunter. The Court, however, finds the exhibit admissible for two reasons. First, throughout the proceedings, Pierce has contended vehemently that Hunter did not represent him, and Hunter has testified to the same effect. Second, this document is admissible under the crime-fraud exception to the attorney-client privilege. *See, e.g., United States v. Chen*, 99 F.3d 1495, 1503 (9th Cir.1996). Here, the communication shows Pierce arranging to have Townsend seek information from a federal judge about a separate pending civil action. This constitutes a fraud on the court and potentially obstruction of justice in violation of 18 U.S.C. § 1503. Pierce's objection of privilege is therefore overruled.

> 2. Obtain all the pleadings and briefs for review by Judge Hunter. I very much appreciate this very valuable step. It would be most helpful to have the Judge's advice regarding what elements are needed to:
>
> A. Successfully move for a new trial and prevailing;
>
> B. Successfully move for an appeal and prevailing.
>
> 3. After the Judge has had a chance to review the case, Jeff [Townsend] needs to visit with him to discuss the issues and the Judge's advice . . . .
>
> 4. Seek the advice of other "wise men" who may be able to help us achieve our objectives A & B above.

(Ex. 431, pp. 1-2.) Pierce confirmed during his testimony that "Judge Hunter" referred to Edwin Hunter's father, Judge Edwin F. Hunter, Jr. Later in the memorandum, where he writes:

> I think we were badly home-towned, but perhaps it is good because we will be more ready next time for what to expect from the California courts. We need to modify our behavior and analysis accordingly. That is the purpose of the experience. We need to use aggressively every opportunity to home-town them in Louisiana,

(Ex. 431, p. 4.)

This memorandum makes clear that, at the very least, Edwin Hunter had offered to Pierce the services of his father, a sitting federal district judge, in analyzing and recommending litigation strategy for a client in an attempt to overturn the ruling of a fellow district court

judge.[26] In addition, the phrase "other wise men" appears to refer to other judicial officers in the state.

This conduct gives rise to even more serious questions about Hunter's character. If Hunter was merely seeking advice, on behalf of Pierce, about the prospects for winning a new trial or an appeal, he could have approached dozens of well respected appellate law firms.[27] Approaching a judge, in violation of the principles of ethics, suggests that Hunter was seeking to use Judge Hunter's influence, not just his legal skills, in order to further Pierce's litigation posture. Such an approach is unquestionably unethical, potentially criminal, and certainly shows Hunter's character to be untrustworthy.

The Court concludes that Edwin Hunter's testimony consisted of numerous lies, and that he has no credibility as a witness.[28]

D. Tortious Acts by Pierce and Hunter that Deprived Vickie of her Expectancy

1. Pierce's Knowledge and Motivation

From early in J. Howard's relationship with Vickie, Pierce knew of the gifts that J. Howard was giving to

[26] The fact that the memorandum was written by Pierce indicates that Pierce was complicit in this conduct.

[27] The Court notes that Pierce has been represented in this matter by the Los Angeles firm Jeffer, Mangels, Butler & Mamaro, one of the most prominent firms in the city.

[28] In light of Hunter's behavior, the Court encourages the United States Attorney for the Central District of California to undertake a close review of the record in this case to determine whether to seek an indictment for perjury under 18 U.S.C. § 1621.

Vickie. He was aware of J. Howard's pattern of giving to his lovers based on his involvement with the Lady Walker litigation and the related gift tax litigation. Pierce knew that J. Howard was starting that same gift-giving pattern with Vickie. He knew that J. Howard had purchased the Tomball Ranch for Vickie as he had signed the deed as co-trustee of the Living Trust.

In the late fall of 1992, J. Howard was preparing to marry Vickie and planning on making a substantial gift to her. Pierce was present at meetings between his father, Hunter, Townsend and Sorensen when J. Howard detailed the type of gift that he was going to make. J. Howard had asked Pierce to coordinate all the details, and accordingly Pierce had frequent contact with J. Howard's lawyers and knew what their assignments were.

J. Howard's plan to give Vickie money based on the value of Koch Industries stock was immediately problematic. Pierce had been responsible for managing litigation with the IRS, one of the central components of which was the value of Koch Industries stock. Pierce and Hunter recognized that if Vickie had any interest in MPI stock, as proposed in the New Community Memo, she would have an interest in increasing the value of that stock. The teaming of a widowed wife with the IRS loomed as a bad combination in the goal of keeping down the value of Koch stock. This was crucial to Pierce, who stood to inherit MPI, and owned Koch stock in his own right. Pierce would therefore tolerate his father's extravagant gifts to Vickie in the form of houses, cars, jewelry and cash. But he could literally not afford to allow J. Howard to give Vickie any interest in Koch or MPI.

2. *The Replacement of Harvey Sorensen with Edwin Hunter*

In Edwin Hunter, Pierce found a person who would aggressively pursue his interests. Hunter had an obviously low opinion of Vickie. He was far more willing to be aggressive in tax litigation than Sorensen. Hunter knew that Pierce was already managing the details that J. Howard so despised dealing with. Hunter's practice of law was all about details. He designed creative and intricate estate planning schemes on a daily basis, the success of which were based on the details of the plans. So while J. Howard would pass over details with a dismissive wave of his hand, Hunter knew that the devil, and therefore the power, was in the details. Hunter also knew that, in time, Pierce would control the interests of the Marshall family and MPI, whose representation could prove extremely lucrative to him.

Hunter was aware of J. Howard's long-held estate planning goals. J. Howard never wavered in his desire to leave Pierce in control of MPI and with his Koch Industries stock. But J. Howard's reckless cavorting with Vickie could endanger those plans. Hunter therefore would act as a guardian of J. Howard's interests.

Sorensen was not so amenable. His ethics were different than Hunter's. Pierce eventually informed Sorensen that he was no longer responsible for Marshall family work. (Ex. 230.) This decision was J. Howard's, who preferred Hunter's more aggressive approach to the IRS. However, this decision was made at the counsel of Pierce, who was given the ultimate responsibility for terminating Sorensen.

J. Howard was notoriously loyal to the people that had worked for him. In the 1960's, when Finley Hilliard had left the accounting firm of Peat Marwick, J. Howard had demanded that his business go with Hilliard, and threatened Peat Marwick that he would personally defend Hilliard if they sued him. This loyalty would not allow him to terminate his attorney of ten years, a man that had become his closest legal adviser and a friend that stayed at his home in Houston, without some outside provocation.

Pierce was responsible for following the details of the Lady Walker litigation. He was the only person that could describe the advantages of one or the other to his father. J. Howard also placed immense trust in Pierce. Thus, when Pierce suggested to J. Howard that Hunter replace Sorensen, J. Howard consented.

3. *August 1993 Changes to J. Howard's Estate Plan*

Evidence of the scheme to drain J. Howard of his assets is demonstrated by the immediate changes to J. Howard's estate planning once Hunter took over. In December 1992, Sorensen had devised a method for J. Howard to begin to give up his controlling interest in MPI. (Ex. 60.) This was important for estate planning reasons. By converting his voting stock to non-voting stock, it would be given a non-voting discount in valuation. Additionally, if he was able to bring his percentage ownership under 50%, he would not suffer the upward adjustment for a controlling interest and would be able to take a discount for a minority position. J. Howard, however, had never voluntarily given up control of anything in his life. He had insisted on being in charge. In his deposition in the Lady Walker litigation, he insisted that MPI never took directions

from anyone other than himself. Accordingly, Sorensen had devised a plan for J. Howard to obtain an irrevocable proxy over Pierce's MPI stock. (Ex. 60.) J. Howard would then be able to control MPI by voting Pierce's stock.

In August 1993, Hunter told J. Howard that this arrangement was unworkable. He contended that if J. Howard gave stock to Pierce with an irrevocable proxy, it would be an incomplete gift, and subject to the estate tax upon J. Howard's death. Despite his proven creativity in tax and estate matters, Hunter told J. Howard that the only way to give up his controlling interest was to sell his shares and trust Pierce to vote the way J. Howard told him to.[29]

In preparation for his meeting with J. Howard, Hunter sent him an estate planning packet of 151 pages. (Ex. 3285.) Based on his past experience with J. Howard, including his drafting a pre-nuptial agreement for J. Howard and Vickie in December 1992, Hunter knew that J. Howard wanted legal documents that were a page or two long. Instead of following these well-known preferences, Hunter buried J. Howard in paperwork, filled with details, that Hunter knew J. Howard would never review.

J. Howard was also capable of being controlled by Hunter and Pierce because of his physical inability to read

[29] The Court suspects that there were several other ways of insuring J. Howard's control of MPI, including an irrevocable proxy on the shares owned by Eleanor Pierce Marshall Stevens, who appeared to leave many business decisions in her ex-husband's hands, or by giving J. Howard a proxy of the shares of MPI that Pierce had previously acquired, which, combined with J. Howard's 49% interest, would be sufficient to keep J. Howard voting a majority of the MPI shares, and thus in complete control.

as a result of having developed cataracts. Thus, J. Howard only read papers printed in extremely large type, and then only with the assistance of reading glasses. J. Howard's practice was to have someone read the document to him. Hunter was responsible for reading a number of documents to J. Howard.

On August 25, 1993, J. Howard signed several documents relating to MPI and his estate planning:

i. J. Howard resigned as a trustee of the MPI voting trust, the trust that technically controlled the voting stock of MPI. (Ex. 3289.)

ii. He sold to Pierce 35,466 shares of MPI stock, representing 15% of the outstanding stock of MPI. (Ex. 3292.)[30] Pierce bought those shares with a promissory note in the sum of $17,355,000, at a rate of 6.26% interest. (Ex. 3291.) The note called for Pierce to pay $575,000 on the first of January and July of each year, with a balloon payment in ten years (the Pierce Note). (Id.)[31]

iii. J. Howard signed a Grantor Retained Annuity Trust (GRAT). (Ex. 3293.) J. Howard transferred 47,288 shares of MPI, representing 20% of the outstanding shares, to the GRAT. J. Howard would receive a payment

[30] At the time, J. Howard owned 164,252 shares of MPI stock. The total number of outstanding MPI shares at the time was 236,440. J. Howard therefore owned approximately 69.5% of MPI before these transactions.

[31] J. Howard did not live ten years to receive the balloon payment. The Pierce Note, meanwhile was later assigned to the Living Trust, of which Pierce was the primary beneficiary. The result was that Pierce avoided paying a substantial sum due on the note.

from the GRAT each year for five years, after which the shares would transfer to Pierce.[32]

iv. J. Howard gave Pierce an outright gift of 2044 shares of MPI, with Pierce responsible for paying the gift taxes. (Ex. 3288.)

v. J. Howard sold back to MPI 14,065 shares in order to cancel his outstanding debt to MPI. (Ex. 3294.)

The result of these transactions was that J. Howard's ownership interest in MPI was reduced to 65,389 shares, a mere 29% of his corporation. The beneficiary of these transactions was Pierce. Although now legally in control of MPI, Pierce's goal was to prevent a transfer to Vickie that might increase the purported value of his shares and undermine the ongoing litigation with the IRS.

4. The Wedding of J. Howard and Vickie and the Surveillance of J. Howard

On June 27, 1994, J. Howard married Vickie. Several members of J. Howard's personal and MPI staff were invited, although Pierce was not. The next day, Pierce and Hunter held a conference call with Henry Schlesinger, who was invited to the wedding. (Ex. 649, p. 101). Pierce and Hunter likely found out about the wedding that day from Schlesinger.[33] This began a flurry of activity by Pierce,

[32] In the event of death, most of the shares in the GRAT would revert to J. Howard's estate.

[33] Hunter claims to have found out in Houston from J. Howard himself. There are no records of this meeting with J. Howard. As noted *supra*, the Court does not find Edwin Hunter credible. Nevertheless, it is clear that Hunter knew about the marriage before July 6, 1994, when J. Howard left to visit Vickie in Los Angeles. Pierce claims that he

(Continued on following page)

Hunter and others to alter J. Howard's estate plan so as to prevent Vickie from receiving a gift and undermining their hard work to reduce the apparent value of MPI stock.

On July 6, 1994, J. Howard left for Los Angeles to visit Vickie. (Ex. 3326, p. 4.) With Pierce's authorization, Dan Hedges hired private investigators to trail J. Howard in California. Pierce had the bills sent directly to his home address in Dallas. Pierce claims that this trail was for J. Howard's protection because Vickie's bodyguard, Pierre DeJean posed a safety risk to J. Howard. The Court, however, finds that the surveillance was not for J. Howard's protection, but instead was to guarantee against J. Howard signing a new will while in California. The Court's finding is based on the following reasons.

i. Pierce and Hedges did not tell J. Howard's driver Arnold Wyche, or J. Howard, that J. Howard was being trailed for his own safety. If Pierce was concerned with J. Howard's safety, he would have told J. Howard and Wyche to warn them of the potential threat.

found out about J. Howard's wedding on July 11, 1994 from Dan Hedges, another of J. Howard's attorneys. The Court finds this incredible. The evidence in Hunter's billing records indicates that Hunter faxed to Pierce the Fine Tuning Memo, which refers to the wedding (Ex. 310a), on July 8, 1994. (Ex. 649, p. 102.) Additionally, Hunter's billing records show numerous conversations with Pierce after Hunter had found out about J. Howard's wedding, and there is every reason to believe that Hunter told Pierce. Finally, J. Howard's wedding was common knowledge at the MPI offices, and Pierce had by that time become President of MPI. It is therefore incredible that Pierce did not know about the wedding shortly after it occurred. Evidence of surveillance placed on J. Howard while he traveled to Los Angeles after the wedding further corroborates this finding.

ii. The surveillance in California ended between 7 PM and 9 PM in the evening. (Ex. 3326.) If DeJean posed a serious threat to J. Howard's safety, it would have been a twenty-four hour threat. Instead, the surveillance ended around the time that J. Howard typically went to bed and would therefore not be able to sign a new will or other document in favor of Vickie.

iii. The surveillance was of J. Howard, not Pierre DeJean. (Ex. 3326.) If Pierce were concerned about J. Howard's safety, he would have DeJean trailed to check his contacts and his actions.

iv. On February 17, 1995, Townsend sent a letter to Vickie's lawyer Patrick Freydl. (Ex. 84.) He indicated to Freydl that:

> [i]t has been reported by reliable sources that either a will, or other type of contract, was executed by Mr. Marshall in California, and that you prepared such a will or contract. On behalf of Mr. Marshall, demand is made for immediate production of any document executed by him . . . . In order that there is no question as to my exact request, please note that I am requesting the original . . . .

(Ex. 84.)[34]

On February 24, 1995, Dan Hedges sent a letter to Pierce, copied to Hunter and Townsend, informing Pierce that Freydl had denied writing a will. (Ex. 675.) The letter

[34] Townsend's request for the original is particularly troubling. Given the record of document tampering in this case, there is an obvious concern that an original in the hands of Pierce and Hunter would be altered or destroyed.

states that this contradicts DeJean's information on a will. Pierre DeJean was evidently the "reliable source" that Townsend referred to. It is unlikely that Pierce considered DeJean a danger to J. Howard in July, but by February considered him a "reliable source."

v. The investigators hired by Pierce kept a liaison with the Federal Bureau of Investigations based on their stated fear that Vickie and DeJean might become involved in interstate or wiretap fraud in their attempt to obtain J. Howard's assets, but never contacted local authorities to express their professed concerns about J. Howard's physical safety. (Ex. 3326, p. 12).

vi. In the Fine Tuning Memo of July 8, 1994, Hunter indicated the major concerns regarding J. Howard traveling to California:

> J. Howard's office believes Vickie's attorneys in California may be preparing documents for his signature, possibilities include:
>
> a. A new will
>
> b. Adoption of Vickie's child
>
> c. Gifts to Vickie

(Ex. 310a, p. 1.)

The concerns of Pierce, Hunter, and "J. Howard's office"[35] demonstrate that they believed that J. Howard could in fact be controlled and tricked into signing away his estate. Their concern was not unfounded. Pierce and Hunter had already drained him of significant assets in

[35] This likely refers to Eyvonne Scurlock and Henry Schlesinger.

August 1993. They now set out on a plan to continue that drain before Vickie's lawyers could get their hands on J. Howard's assets. Despite all the concern of Pierce, Hunter, and "J. Howard's office," there was never any evidence introduced that ~~Vickie~~ or her lawyers attempted to have J. Howard sign a will, adoption documents, any gift instrument, or any other document divesting J. Howard of his wealth.

5. July 1994 Changes to J. Howard's Estate Plan

On July 8, 1994, Edwin Hunter drafted the Fine Tuning Memo. (Ex. 310a.) This is reflected in his billing records for July 8, 1994. (Ex. 649, p. 102, # 7662.) This memo formed the foundation of plans to prevent J. Howard from making a gift involving MPI or Koch stock that would disrupt the gift tax litigation or run the risk of valuing Koch stock at a high price. The thrust of the plan was to make sure that any property owned by J. Howard be put into his living trust and to make his living trust irrevocable so that J. Howard would be unable to make any gifts to Vickie. Hunter's Fine Tuning Memo indicates the importance of making the living trust irrevocable. Were J. Howard, then eighty-nine years old, to be declared incompetent, Vickie, as J. Howard's wife, would have the preference under both Texas and California law of being appointed guardian of J. Howard. (Ex. 310a, p. 2, B.1-2.) Hunter notes that "[h]er appearance as J. Howard's guardian might disrupt the estate plan and could lead to litigation with the family." (Ex. 310a, p. 2, B.4.) Hunter and Pierce were concerned that Vickie's meddling might lead to a transfer of property away from Pierce and to her, leading to a high valuation of Koch stock. Moreover,

making the trust irrevocable would leave "less for mischief (or Miss Cleavage)," meaning Vickie. (Ex. 310a, p. 12, 2.a(2).) Hunter's office immediately began drafting several documents to accomplish this goal.

Along with several other goals, Hunter and Pierce addressed the August 25, 1993 Pierce Note. Under Texas Community Property law, income derived from J. Howard's separate property would be community property. (Ex. 310a, p. 4, IV.A.1.b.) Hunter's office then prepared documents to prevent Vickie from ever being able to collect any of the money from Pierce's payments on the note. J. Howard signed a promissory note to MPI for $5,618,074. (Ex. 288.)[36] To secure this debt, J. Howard pledged to MPI the August 25, 1993 Pierce Note. (Ex. 289.) This would allow MPI, now run by Pierce, to intercept the note payments before they reached J. Howard and Vickie, and use the payments to pay down the debt owed to MPI. (Ex. 310a, p. 6, VII.A.4.b.) Because the Living Trust was also being made irrevocable, Vickie would never be able to recover those proceeds. Hunter was concerned that by encumbering the note, there might be an improper interference with Vickie's community property interest in the income stream. To solve this problem, those documents were then backdated to June 1, 1994, before J. Howard and Vickie were married, as detailed in Part IV.D.8.iv, *infra*. By backdating the note, it also served to void any

[36] The comments in Hunter's Fine Tuning Memo suggest that this was money that J. Howard already owed to MPI. (Ex. 310a, p. 6, VII.A.) Indeed, it was J. Howard's custom to support himself by borrowing funds from MPI, which in turn borrowed funds from Texas Commerce Bank, backed by MPI's interest in Koch. J. Howard would then settle the debt with MPI by selling shares of stock back to MPI. These debts, however were unsecured.

instrument assigning the note to Vickie as a gift that they feared J. Howard might have signed while in California.

On July 12, 1994, Hunter, Pierce, Jeff Townsend, Hilliard, Scurlock, and J. Howard met at the MPI offices in Houston. Pierce at that time confronted his father about his marriage, at which point J. Howard admitted to Pierce the he had married Vickie. The group briefly discussed estate planning options with J. Howard and was ordered to reconvene the next day.

On July 13, 1994, and again on July 15, 1994, Hunter, Pierce, Townsend, Hilliard, Scurlock, and J. Howard met at the MPI offices in Houston to sign J. Howard's estate planning documents. Because J. Howard could not see well enough to read the document, Hunter read to J. Howard what he considered to be the pertinent provisions of the Amended and Restated Living Trust. Pierce was in the next room when Hunter read the document to J. Howard, but was present when J. Howard allegedly signed the Amended and Restated Living Trust. During this period, J. Howard also signed the Assignment, Pledge, and Promissory Note that purport to be dated June 1, 1994. (Exs.287-289.) J. Howard also signed an act of procuration (power of attorney) and a donation of his membership in the River Oaks Country Club to the Living Trust during this period.

After J. Howard had signed the Amended and Restated Living Trust, a new page two of the trust was inserted, as detailed in Part IV.D.8.v, *infra*. The new page contained the provision stating that the trust was irrevocable. Because J. Howard was totally dependent on Hunter to inform him of the contents of the document, he was unaware that the amendments made the trust

irrevocable. The evidence shows that nearly a year later, he still believed that he had total control of his assets. On May 26, 1995, J. Howard made a tape recorded statement to the judge in the guardianship proceedings wherein he stated: "despite what Pierce or anybody says, I have been a successful businessman and am not broke." (Ex. 364.) By that time, however, J. Howard had been stripped of his remaining assets and was technically broke. Furthermore, Glenn Johnson, who was appointed by the Texas probate court as J. Howard's temporary guardian on May 31, 1995, testified in the Texas probate proceedings that he had a conversation with J. Howard about his estate plan. According to Johnson, J. Howard's opinion of the changes to his estate plan were as follows: "He trusted Pierce and had no problem with it, and if he ever didn't like it, he could change it." (Ex. 3638.) However, because the Living Trust had been made irrevocable, and J. Howard divested of all his MPI stock, he could not change his estate plan. J. Howard had been duped.

Following the signing of the Amended and Restated Living Trust, the document was given to J. Howard's assistant Scurlock, who also notarized the signatures. Four to six days later,[37] on July 19, 1994, Scurlock gave the document to Townsend for him to record. Townsend then took the document from Houston to his office in Lake

[37] There was a disagreement about whether the Amended and Restated Living Trust was signed on July 13, 1994 or July 15, 1994, thus it is unclear whether there were four or six days between its execution and its delivery to Townsend for recording. This is due in part because page one and page twenty-two indicate two different dates of execution. Although this is an example of the many questionable factors of the document, *see* Part IV.D.8.v, *supra*, the discrepancies between July 13 and July 15 appear to be immaterial.

Charles, Louisiana. The next day, Townsend had a stack of copies of the document made at his office. In his office, Townsend had a relatively modern photocopy machine equipped with a document collator. Townsend's plan was to record the document and provide the copies to the county recorder to certify, saving the time and expense of having the county recorder copy the documents.

The morning after Townsend had the copies made, he flew from Lake Charles to Midland, Texas. From Midland, Townsend drove approximately 30 miles south where he recorded the Amended and Restated Living Trust in Glasscock County, Texas. Glasscock County is one of the smallest counties in Texas. It has a single courthouse, but there are no lawyers in the County. Glasscock County's sole prior claim to fame was that it had a lakebed that filled every 20 years.

Upon arriving at the Glasscock County Courthouse, Townsend met the county clerk, Betty Pate, and her deputy, Shirley Wood. They informed Townsend that they could not use his copies, and would instead have to make the copies of the document in the county offices. Townsend discarded the copies he had brought from Lake Charles and Pate and Wood proceeded to make approximately 40 copies of the document on the Glasscock County copy machine, and collated the copies by hand. The original was then recorded and the copies certified. Townsend then used the certified copies to record the trust instrument by mail in several counties in Texas and parishes in Louisiana.

Had the Living Trust been recorded in Harris County, the public records would have been more readily accessible, and it is possible that the press would have found out

the details of J. Howard's personal finances. Indeed, another of J. Howard's lawyers, Dan Hedges, had obtained public record information of J. Howard's wedding to Vickie. Recording the document in the smallest county in Texas made that nearly impossible. One explanation for this is that Pierce did not want a story printed, or a friend of J. Howard's telling him, about the Living Trust being made irrevocable.

6. Further Changes to Estate Plan Between July 1994 and May 1995

Over the next year, J. Howard's health deteriorated. He was hospitalized on three different occasions, diagnosed with terminal cancer, and never recovered his physical strength. J. Howard's ill-health engendered a guardianship dispute between Pierce and Vickie. On May 31, 1995, the Texas probate court appointed Glenn Johnson the temporary guardian of the person of J. Howard. After Johnson's report to the probate court, Betty Morgan was appointed permanent guardian.

Several final changes to J. Howard's estate plan were undertaken during this time. Pierce and Finley Hilliard, as trustees of the J. Howard Living Trust, re-sited the trust to Louisiana. (Ex. 341.) As Hunter had written in the Fine Tuning Memo, this was an option to exercise if it would give them an advantage. (Ex. 310a.) By moving the trust from Texas to Louisiana, Pierce, Hunter and Hilliard were taking advantage of Hunter's familiarity with Louisiana – they were preparing to "hometown" any opponents, as Pierce would later describe it. (Ex. 431.)

Acting under his power of attorney, Pierce signed a document renouncing J. Howard's right to collect distributions from the living trust. (Ex. 145.) The renunciation was purportedly signed on December 28, 1994. According to Pierce, he read the document over the phone to J. Howard, who was then at his home in Houston. Pierce claims that J. Howard then told him to sign the document. This claim is not credible. It was J. Howard's intent to keep for himself as much income as he could, allowing him to finance his lifestyle and his gifts to Vickie. He had no interest in renouncing his right to obtain income from the living trust.

Pierce may have signed this document in the Spring of 1995, while he was feuding with Vickie over spousal support and guardianship. Pierce had discontinued paying Vickie's bills, and by renouncing J. Howard's right to demand income from the Living Trust, he would be cutting off Vickie's derivative rights.

Furthermore, the document is irregular on its face. It was notarized by Eyvonne Scurlock. As detailed in these findings, Eyvonne Scurlock fraudulently notarized several backdated documents prepared by Hunter. Her notary book bears no record of having notarized the Renunciation on December 28, 1994. (Ex. 676.) Moreover, Finley Hilliard's signature as a co-trustee of the living trust was not notarized until February 22, 1996, more than six months after J. Howard's death. (Ex. 145.)

Accordingly, the Court finds that the document was not signed in December 1994.

7. *May 1995 Changes to the Estate Plan*

The last set of changes to J. Howard's estate planning purportedly took place on May 26, 1995. J. Howard's remaining 63,051 shares of MPI stock were sold back to MPI in exchange for a private annuity. (Ex. 3370.) Under the terms of the annuity, MPI would pay J. Howard $7,906,006 on March 31 of each year, commencing in 1996, as long as J. Howard was alive. (Ex. 3370.)[38] J. Howard did not live to see March 31, 1996, and accordingly the MPI ended up paying nothing for J. Howard's remaining shares. Nor could J. Howard be reasonably expected to live until March 31, 1996. J. Howard had been diagnosed with terminal stomach cancer in Spring 1995. Pierce, who signed the Sale for Private Annuity as both the co-trustee of the J. Howard Living Trust and as President of MPI was entirely aware of J. Howard's condition. He had been advised of the diagnosis by J. Howard's physician Dr. Reed in April 1995. Pierce therefore arranged to strip J. Howard of his final vestiges of ownership in MPI for no consideration.

Also purportedly on May 26, 1995, the GRAT sold to MPI the 47,288 shares of MPI that it held in exchange for a $24,753,376 note. (Ex. 3376.) The terms of the note were that MPI would pay interest of approximately $1,898,584 to the GRAT each year, with the principle on the note due in 2010.[39] (Ex. 90.) Transferring the stock out of the GRAT

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[38] The annuity provided that the payment would increase by 20% each year.

[39] Pierce testified that, had J. Howard lived until March 31, 1996, MPI would have had to borrow nearly $10 million to finance the payments due on the private annuity and note. At the time, MPI had obtained a $15 million line of credit from Texas Commerce Bank, secured by MPI's interest in Koch stock. According to Pierce, Texas

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was necessary to prevent MPI stock from falling into Vickie's hands, because if J. Howard were to die before 1998, 99% of the corpus of the GRAT would return to J. Howard's "estate." (Ex. 3293.) Pierce had been continually concerned that J. Howard might have signed a will in California, giving money and possibly leaving his residuary estate to Vickie. This concern motivated him to conduct surveillance on J. Howard while he was in California, (Ex. 3326), was expressed in Hunter's Fine Tuning Memo, (Ex. 310a, p. 4, "C. Effect of a Clandestine California Will"), was evidenced by Townsend's letter to Pat Freydl indicating that Townsend had information that Freydl had prepared a will for J. Howard, (Ex. 84), and was the motivation for making the Living Trust irrevocable.

Pierce and Hunter both testified that these changes were undertaken at J. Howard's direction. This was in the face of the obvious incredibility of a ninety year-old man, diagnosed with terminal cancer, agreeing to give up his last assets in exchange for an annuity that he would never live to see paid. Moreover, Pierce did not believe that J.

Commerce Bank had become concerned with the amount of money outstanding to MPI. It had insisted that MPI reduce its debt to $12 million and that it stop taking out loans to finance J. Howard's personal spending. It is therefore unfathomable how Pierce would have been able to convince Texas Commerce Bank to nearly double MPI's line of credit to pay the amounts due under the note and the private annuity. Moreover, even if it had been able to borrow enough to pay the amounts due in 1996, Hunter testified that the private annuity would only be a good business decision for J. Howard if he lived for five years or more. Thus, MPI would have had to borrow nearly $50 million over five years to finance J. Howard's personal spending, at a time when its lender had reduced its line of credit from $15 million to $12 million. The testimony that the May 1995 transactions were legitimate and sound business decisions, undertaken at the behest of J. Howard, is contradictory and therefore not credible.

Howard had the capacity to make these decisions. On May 26, 1995, Pierce signed a Directors Consent stating that J. Howard no longer had the capacity to act as a director for MPI, and removed him from the MPI board. This made Pierce the sole director. (Ex. 3375.)

Even if the Court were to view Pierce's actions as good faith efforts to preserve his father's long-held estate planning wishes, which it does not, his actions still defy both the law and fundamental ethics. Beyond the legal questions that the Court has had to deal with, there are philosophical questions as to whether an elderly person has the right to spend his money as he chooses, even if he does so in a foolhardy way. Whatever his personal actions, J. Howard had earned his life's fortune, and Pierce never had the right to interfere with the way that J. Howard saw fit to spend it.

8. *Destroyed, Altered, Backdated, and Fraudulent Documents*

Pierce and Hunter's actions of slowly draining J. Howard of assets in order to prevent a gift to Vickie were egregious in nature. What is worse, however, is that many of the documents at issue in the case were destroyed, backdated, altered, or prepared and presented to J. Howard under false pretenses. This was done in order to prevent Vickie from receiving funds, out of fear that J. Howard might sign a will or other gift instrument at Vickie's behest, and to avoid the legal consequence of important dates in J. Howard's final years including his marriage to Vickie and the appointment of a guardian ad litem to manage his affairs.

The backdating and altering of the documents was done with the full knowledge of Pierce. Most of the backdated documents were prepared by Edwin Hunter, whose brilliant machinations on estate planning Pierce relied on to devise the necessary actions. Finally, many of the backdated documents were notarized by Scurlock who violated her oath by signing false notarial statements.

The documents subject to destruction, backdating, altering or false pretenses were:

i. The draft of the catch-all trust prepared by Hunter prior to his December 1992 meeting with J. Howard

As detailed in Part IV.C.1, *supra*, the evidence shows that Hunter prepared a "catch-all" trust prior to his December 1992 meeting with J. Howard, that was a mechanism for J. Howard to give a substantial gift to Vickie. That document was never produced by Hunter.

ii. The Grantor Retained Annuity Trust (GRAT) (Ex. 3293)

This document was originally signed by J. Howard on August 25, 1993, and held 47,288 shares of MPI. The document was altered by Hunter in March 1994.

In early 1994, Harvey Sorensen, who was responsible for filing tax returns for MPI, pointed out to Hunter that the copy of the GRAT that he had received in September 1993 was not qualified to hold shares of a subchapter "S" corporation under the Internal Revenue Code, and therefore MPI's subchapter "S" election was in jeopardy. Although Hunter responded that it complied with an IRS

Private Letter Ruling (*see* Ex. 133), he simultaneously directed Cherry Doucet to revise the GRAT. Doucet prepared revisions of the GRAT on March 2, 1994. (Ex. 649, p. 11.) Page two of the GRAT was then substituted. (Ex. 281, Sorensen letter stating his conclusion that the GRAT had been altered.) The revised GRAT added the following sentence to paragraph four of the GRAT: "Grantor may substitute property of equivalent value for the original trust corpus." (*Compare* Ex. 245 with Ex. 3293.) Because the substituted sentence added a line to page two, another line had to be deleted from the page so as to not disturb other pages, including the signature page. Paragraph 10(a) of the GRAT defined the Trustee's powers "[t]o sell at public or private sale . . . real estate . . . ." (Ex. 245.) The superfluous words "at public or private sale" were deleted, eliminating a line from paragraph 10(b), allowing the revised page two to be inserted in place of the original. (*Compare* Ex. 245 with Ex. 3293.)

Hunter then sent the revised pages to Sorensen. (Ex. 281.) Sorensen believed at first that the page was substituted and refused to sign the tax return until he had gotten an explanation from J. Howard or Hunter. Sorensen later called J. Howard's office and was told by Eyvonne Scurlock and Edwin Hunter that there had been a "miscollation" because everyone was in a hurry because of J. Howard's impending marriage. (Exs.316, 317.) The alteration of this document demonstrates Hunter's practice of altering documents.

iii. The Donation of the GRAT to the Living Trust (Ex. 268)

The document purports to be dated January 13, 1994. However, Hunter's Billing records indicate that on July 12,

1994, Cherry Doucet of the Hunter Firm "[d]rafted donation of interest in GRAT." (Ex. 649, p. 103, # 7533.) The document also purports to be notarized on January 13, 1994, by Scurlock, yet Scurlock's Notary Book does not include a record of notarizing the document. (Ex. 676.) The GRAT originally provided that if J. Howard died prior to its expiration in 1998, 99% of the MPI shares that it owned would revert to J. Howard's estate, which Pierce and Hunter feared would go to Vickie through a "clandestine California will." By transferring the ownership of the GRAT from J. Howard to the Living Trust, they hoped to insulate the GRAT from ever passing MPI stock to Vickie.[40] Additionally, by backdating the document, they would insure that it had not been transferred to Vickie while J. Howard was in California.

iv. The Promissory Note to MPI, the Pledge, and Assignment of the Pierce Note (Exs.287-289) all of which are dated June 1, 1994

These three documents were in fact signed on July 13 or 15, 1994. Hunter's billing records show that Cherry Doucet of the Hunter Firm "[d]rafted pledge and assignment; Drafted promissory note" on July 11, 1994. (Ex. 649, p. 103, # 7535.) There is no record of a meeting with Pierce or J. Howard to sign these notes on June 1, 1994, or records indicating that Hunter prepared these documents prior to June 1, 1994. Hunter's Fine Tuning Memo, which was drafted after J. Howard's June 27, 1994 marriage to

[40] In May 1995, Pierce and Hunter arranged to sell the GRAT's MPI shares back to MPI for cash, to make absolutely certain that Vickie would never have any MPI stock.

Vickie, indicates that these transactions should occur in the future. (Ex. 310a, p. 6, VII.A.4.) The documents also purport to be notarized on June 1, 1994 by Scurlock, yet Scurlock's Notary Book (Ex. 676) does not include a record of notarizing the documents on June 1, 1994, or at any date thereafter. As noted, *supra,* these documents allowed Pierce, at his discretion, to stop the flow of income from J. Howard, and instead re-direct the payments to MPI. Because the income would have been community property, Vickie had an interest in these notes after she married J. Howard, and thus the backdating deprived her of that interest without her involvement. Additionally, the documents effectively eliminated J. Howard's ability to give or bequeath to Vickie the August 25, 1993 Pierce Note, as it was encumbered by the note to MPI.

v. The Amended and Restated Living Trust of July 13, 1994

The Amended and Restated Living Trust dated July 13, 1994 had key pages substituted. Donald J. Fandry, a forensic document expert, undertook an extensive examination of this document. (AP 023175-023206.) Fandry found that page two was added to the Amended and Restated Living Trust after the date of July 13, 1994. According to Fandry, the second page, where the Living Trust was made irrevocable has a different type of paper with no watermark, whereas the other pages all contain a watermark, "Eatons Eminence bond U.S. Berkshire."

Additionally, Fandry found that the printing on this second page is also a different type of printing process indicating that it was printed at a different time and/or on a different printer. The toner spattering, when inspected under a microscope revealed that the toner is much

broader on the watermarked pages. The toner spattering on page two is much cleaner, meaning less spattering of toner.

Finally, Fandry found that the staple hole patterns do not match other pages indicating that pages were substituted subsequent to the initial completion of the document.

Fandry also found that page three of the living trust was substituted. According to Fandry, the staple holes on page three also show a marked discrepancy with other pages. As an example, there are significantly less staple holes on page three than page four. The indentations of the staple wire patterns are not consistent with other pages. The holes and indentations do not line up.

Another expert, J.L. Hale, Jr., reviewed the Amended and Restated Living Trust Document and came to similar conclusions as Fandry. (Ex. 686.) Hale confirmed that page two has no watermark, that the staple patterns are different from the other pages, and that it was printed with a different quality printer. Hale also points out that page three has staple hole patterns that are inconsistent with the rest of the document. In addition, Hale notes that the watermark on page three is upside-down, indicating that it was inserted into the document at another time than the other pages. According to Hale, "Page 2 was inserted to replace a different page at some point . . . [and it] is patently obvious that page 3 was inserted at some point to replace a different page." (Ex. 686.)

Based on this analysis, and the Court's own review, the Court agrees with both Fandry and Hale that pages two and three were substituted. Pages two and three include Article III, which reads as follows:

This trust shall be irrevocable. The Settlor expressly reserves the power to substitute E. Pierce Marshall, Elaine T. Marshall, or any § 170(b)(1)(A) organization for the beneficiary of any established in the instrument. For the purposes of this Article III, the term "§ 170(b)(1)(A) organization" shall have the meaning attributable to it by the Income Tax Regulation § 1.170 A-G.

Further, Settlor expressly reserves the right to reduce any distributions set forth in Article VI, Paragraph B, any such reduction increasing the portion of the trust estate under Article VI, Paragraph C. Settlor shall exercise these powers by notarial act.

Except as provided in this Article III, the Settlor shall have no power to alter, amend, modify or change this trust indenture.

All statements or references to the Trust being irrevocable are set forth in Article III, which is contained entirely on pages two and three. These pages have been substituted due to intentional acts by Hunter, with the knowledge of Pierce. Moreover, there is no evidence, other than the self-serving statements offered by Pierce and Hunter, that J. Howard had ever before sought to make the Living Trust irrevocable, despite numerous opportunities to do so in the preceding ten years. The trust provisions were read to J. Howard, and the pages containing the irrevocable clause were substituted after the document was executed. Because of these intentional acts, the Court finds that [] the original pages set forth a revocable trust.

Fandry and Hale opine that not only does the Amended and Restated Living Trust contain substituted

pages, which J. Howard would not have seen, but that in fact, J. Howard's signature on page twenty-two of the document is forged. Fandry and Hale undertook significant handwriting analysis to determine that the signature of J. Howard was likely not genuine. Moreover, Hale found that the watermark on page twenty-two is also upside-down, corroborating his opinion that J. Howard's signature was forged.

These three pages are the most critical pages in the Amended and Restated Living Trust. Pages two and three make the trust irrevocable, while page twenty-two is the page on which J. Howard purportedly signed the document. These three pages are the only ones that have been drawn into dispute during the course of the litigation between the parties, and are the pages that served to insure that J. Howard could not make a substantial gift of his wealth to Vickie.

It is also clear from the record that the Amended and Restated Living Trust was not immediately recorded. Instead, it was kept in the possession of either Pierce, Hunter or Scurlock for four to six days, until July 19, 1994. At that point, the document was given to Townsend, who returned to Lake Charles with it and subsequently recorded it in Glasscock County, Texas on July 21, 1994.

The testimony of Hunter and Pierce border on a concession of substitution of these pages. The explanation offered by Hunter is that possibly J. Howard himself substituted these two critical pages. There is absolutely no testimony or evidence of anything that approaches this ludicrous speculation. The suggestion that J. Howard, who had just had this document read privately to him by Hunter, subsequently got his hands on the document and

attempted to read the unreadable and then went to a word processor and typed out these new pages and stapled them together is unbelievable. Furthermore, the evidence shows that, up until the time of his death, J. Howard believed the Living Trust was revocable. *See* Part IV.D.5, *supra.*

vi. The Sale for Private Annuity (Ex. 3370)

As detailed, *supra,* this document was signed under false pretenses. Under the terms of the document, in May 1995, J. Howard sold to MPI his remaining shares of MPI stock for an annuity that would not begin paying until March 1996. Hunter represented that this would be a sound business investment if J. Howard lived another five years. However, at the time, J. Howard had been extremely ill and had been hospitalized three times in the previous five months. His health was so poor in January that Townsend began looking into funeral arrangements. Even to the extent that J. Howard recovered after January 1995, it was clear that J. Howard, then ninety years-old, would not live for five years, as he had been diagnosed in April 1995 with terminal stomach cancer.

This document is also a case of self-dealing. Pierce signed the document as co-trustee of the living trust and as President of MPI. Thus, he was improperly involved on both sides of the transaction. Moreover, Pierce was the only one that stood to benefit from the sale. By May 1995, Pierce had become the primary shareholder of MPI. He also stood to receive any outstanding shares then owned by his mother, Eleanor, as the residual beneficiary of her charitable trust. Thus, by having MPI purchase J. Howard's remaining shares, he was becoming the sole shareholder of the company. He was able to do this without

paying anything to J. Howard since Pierce knew that J. Howard would not live to collect the proceeds of the annuity.[41] Furthermore, Pierce stripped him of his last remaining interest in MPI which he could have given to Vickie.

vii. The Renunciation of J. Howard's right to receive distributions from the Living Trust (Ex. 145)

Acting under his power of attorney, Pierce purportedly signed this document for J. Howard on December 28, 1994. However, as demonstrated in Part IV.D.6, *supra,* that claim in not credible and the document is irregular on its face. Pierce's signature purports to be notarized by Eyvonne Scurlock, but there is no such record in her notary book. (Ex. 676.) Moreover, Finley Hilliard's signature as a

[41] There is some evidence that this document, and the entire series of documents executed in late May 1995, may have been backdated. The Charitable Lead Trust is questionable on its face, as it purports to be dated on May 29, 1995, but is notarized by Scurlock three days earlier, on May 26, 1995. (Ex. 99.) Once again, Scurlock's notarization is in question, as there is no May 26, 1995 entry in her notary book. (Ex. 676.) Additionally, Hunter's billing records indicate that his partner, Glynn Blazier, was researching: "requirements of qualified lead annuity trust; Prepare draft documents" on July 12, 1995. (Ex. 3344, p. 80.) Additionally, Pierce had strong motivation to backdate the documents to May 26. On May 31, 1995, Glenn Johnson was appointed J. Howard's temporary guardian ad litem, thus any documents relating to his assets signed after that time might be called into question. The motivation to falsify, the irregularities of the document, the use of a discredited notary, work that appears to relate to the document after it was purportedly signed, and the pattern that Pierce, Hunter and Scurlock have demonstrated in falsifying and backdating documents give strong indication that these documents were also backdated. However, the evidence on this point is not as clear as the evidence of backdating of the other documents, and is unnecessary to this Court's findings.

co-trustee of the Living Trust was not notarized until February 22, 1996, more than six months after J. Howard's death. (Ex. 145.) The document may have been signed in Spring 1995, as part of Pierce's plan to cut Vickie off or in February 1996, after J. Howard's death. Although the Court cannot determine with certainty the date the document was actually signed, it does conclude that it was not signed in December 1994. This left J. Howard without the right to collect any income from his primary assets contained in the Living Trust, and he would therefore be unable to give any of it to Vickie. It also effectively cut-off Vickie's rights to demand payment from the Living Trust.

viii. The Co-Trustees Resolution, purportedly dated February 7, 1995, that resited the trust from Houston, Texas to Calcasieu Parish (Lake Charles), Louisiana (Ex. 341)

Hunter's billing records indicate that work began on changing the situs of the trust on May 31, 1995. (Ex. 3344, p. 64.) On that day, Hunter spoke to Hilliard and Townsend about the issue. (Id.) He then had a conference with his partner Tim O'Dowd on the issue. (Id.) O'Dowd researched the issue on May 31 and June 1, 1995. (Id.) On June 5, 1995, O'Dowd wrote to Pierce on the issue. (Ex. 3344, p. 65.) On June 6, 1995, O'Dowd drafted "Resolution of Trustees for change of situs." (Id.) Thus, although the resolution purports to be dated February 7, 1995, it was in fact executed after June 6, 1995. By re-siting the Living Trust to Louisiana, Vickie would lose the ability to control the venue of the litigation, in favor of what Pierce and Hunter considered a more favorable "hometown."

V. FINDINGS PROPOSED BY THE BANKRUPTCY COURT

Except to the extent that they are inconsistent with the findings of fact set forth in this order, this Court's de novo review upholds the findings of fact proposed by the bankruptcy court in its October 6, 2000 Original Decision, *Marshall I*, 253 B.R. 550.

CONCLUSIONS OF LAW

I. CAUSE OF ACTION FOR TORTIOUS INTERFERENCE WITH AN *INTER VIVOS* GIFT[42]

The bankruptcy court found that Pierce tortiously interfered with Vickie's expectancy of an *inter vivos* gift. The Texas Supreme Court [43] has never ruled on whether Texas recognizes a cause of action for tortious interference with an *inter vivos* gift. *See Brandes v. Rice Trust, Inc.*, 966 S.W.2d 144, 146 (Tex.App.1998). In the absence of a settled rule of law enunciated by the highest court of the applicable state, a federal court should use its best judgment to

[42] When conducting a *de novo* review of the bankruptcy court's proposed findings of fact and conclusions of law, a district court must review "those matters to which any party has timely and specifically objected." 28 U.S.C. § 157(c)(1). Pierce filed his brief on the merits on June 25, 2001, and his amended assignments of error on June 27, 2001. Pierce did not object to the bankruptcy court's reading of Texas law. On January 8, 2002, Pierce filed an additional brief on Texas law. That brief was untimely and in contradiction of the Court's August 27, 2001 Order stating that "[b]ecause the parties have already briefed the merits, no trial briefs need be submitted." Accordingly, Pierce's January brief is STRICKEN. Nevertheless, the Court addresses the issue of law *sua sponte*.

[43] Neither side has contended that anything but the law of Texas applies. The Court therefore assumes without deciding that Texas furnishes the applicable law.

predict how the highest state court would rule. *Ins. Co. of the State of Pennsylvania v. Associated Int'l Ins. Co.*, 922 F.2d 516, 520 (9th Cir.1990). In such a situation, the federal court should look to the decisions of intermediate state courts for guidance. *Id.* "Indeed, state intermediate appellate court decisions are not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise." *Id.* (internal quotation marks and citation omitted).

Texas courts have recognized a cause of action for tortious interference with an inheritance. *King v. Acker*, 725 S.W.2d 750, 754 (Tex.App.1987) (citing *Tippett v. Hart*, 497 S.W.2d 606 (Tex.Civ.App.1973)). In finding that the tort existed, the court relied on the ancient maxim that the law will afford a remedy to every invasion of a legal right. *Id.* (citing *Chandler v. Welborn*, 156 Tex. 312, 294 S.W.2d 801, 807 (1956)); *accord Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, 2 L.Ed. 60 (1803). It therefore adopted the position of the Second Restatement of Torts, which creates a cause of action against "[o]ne who by fraud, duress, or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received." Rest.2d Torts § 774B (1977). By adopting this position, the Texas court concurred with courts in most jurisdictions that also recognize this tort. Rest.2d Torts § 774B, Reporter's Note (1982 App.).

Pierce suggests that *King* is inapposite because it involved interference with an inheritance, not, as the present case does, interference with an *inter vivos* gift. However, the court in *King* indicated that the Restatement was the proper rule. *King*, 725 S.W.2d at 754. The same

section of the Restatement that creates a cause of action for interference with an inheritance creates a cause of action for interference with a gift. *See* Rest.2d Torts § 774B. The same section should therefore be treated in the same manner. In the absence of a persuasive reason to the contrary, the Court is bound by the court's holding in *King* that Texas law adopts section 774B of the Restatement. *Associated Int'l Ins. Co.*, 922 F.2d at 520.

Pierce argues that public policy counsels against recognizing a tort for interference with a gift, because a thwarted donee can approach the donor to resolve the problem. While that is true as a general rule, in circumstances such as the present one, where the donor dies before the interference is discovered, the intended donee's sole remedy is with the courts. Indeed, public policy suggests that a cause of action for tortious interference with a gift is well founded. If a donor intends to give a gift to a donee during his lifetime, but is thwarted by the residual beneficiary of the donor's estate, equity demands that the heir not benefit from his wrongful conduct.

Accordingly, the Court's best judgment is that Texas law recognizes a cause of action for tortious interference with an *inter vivos* gift.

II. ELEMENTS OF TORTIOUS INTERFERENCE WITH AN *INTER VIVOS* GIFT

Although Texas law does not specify the elements of a cause of action for tortious interference with an expectancy, other jurisdictions have clearly delineated the elements. *See, e.g., Doughty v. Morris*, 117 N.M. 284, 871 P.2d 380, 384 (1994). A plaintiff must prove (1) the existence of an expectancy; (2) a reasonable certainty that the

expectancy would have been realized but for the interference; (3) intentional interference with that expectancy; (4) tortious conduct involved with the interference; and (5) damages. *Id.*

A. Existence of an Expectancy

J. Howard made numerous promises to Vickie that she would receive half of what he owned. These include promises on at least three occasions when he proposed to her: when J. Howard purchased the Tomball Ranch; when he purchased the 1992 Mercedes for her; and when he proposed to her in June 1994, which she then accepted. J. Howard made similar promises on other occasions in his proposals to Vickie and protestations of love for her. These promises are corroborated by J. Howard's pattern of wooing Lady Walker with his great wealth, and his proposals to Vickie were witnessed on at least one occasion by Harvey Sorensen.

Pierce argues that Vickie did not have a genuine expectancy of a gift because of various actions and public statements that she made. In particular, Pierce points to Vickie's appearance on the Howard Stern radio show two days before J. Howard's death. At that time, Vickie stated that she would not be getting anything from J. Howard's will. Not only is this statement technically correct, but it was made as part of a public relations campaign. As Vickie testified to in this Court, she did not want people to think that she had married J. Howard only for his money, as that appearance would harm her public persona and detract from her acting and modeling career. It is therefore entirely reasonable that she misled Howard Stern to improve her public image.

As set forth above, while Vickie may have thought he was prepared to give her half of everything he owned, Vickie's objectively reasonable expectancy, and the amount that J. Howard intended to give her, was half of his "new community." This term was defined by J. Howard as one-half of the growth of his assets during the time of their marriage.

The expectancy is also corroborated by the fact that J. Howard conferred on several occasions with his attorney about ways to make a substantial gift to Vickie, that would provide her with money after his death. This included several potential pre-nuptial agreements that contained gift clauses, his direction to Hunter to draft a "catch-all" trust, and his direction to Sorensen to create a legally enforceable gift of one-half of his new community. It is further corroborated by his knowledge that Vickie's career might be short-lived and he believed her to be "unteachable," so it would be necessary to provide for her in retirement.

B. Reasonable Certainty of Realization But For Defendant's Conduct

A plaintiff must establish that there is a reasonable certainty that the gift would have been realized but for the defendant's conduct. The Comment to the Restatement notes that "complete certainty is impossible. It is not required." Rest.2d Torts § 774B, cmt. d. (1977). Instead, the Restatement requires only "proof of a high degree of probability that the" donor would have made the gift absent the defendant's conduct. *Id.* Moreover, "[t]he fact that it was the defendant's tortious act that makes it not possible to prove with certainty may be taken into consideration by the court." *Id.*

Here, Vickie has introduced evidence that shows a high degree of probability that J. Howard would have made a gift to Vickie. He directed two attorneys to prepare documents giving her a substantial gift as early as fall 1992. Although the gift was not feasible at that time due to the gift and generation-skipping tax burdens, there is no evidence that J. Howard ever retreated from his intention to give a gift to Vickie. Once he married her, the gift and generation-skipping tax consequences disappeared, and J. Howard would have been able to make a substantial gift. The evidence shows that through the very end of his life, Vickie was the most important person to J. Howard. Pictures of them together during Christmas 1994 show an elated J. Howard. Tape recorded statements made by J. Howard in May 1995, less than two months before his death, demonstrate that he still believed that Vickie was "the light of his life," that she had "saved his life," and that he wanted her "to be supported by" him. (Ex. 364.) [] His actions seeking to have children with Vickie, either by adopting her son or by conceiving on their own, demonstrate that his commitment to provide for her only increased over time. Indeed, it was J. Howard who aggressively gave money to Vickie. He gave her more than anything she had explicitly asked for.

The evidence also demonstrates that it was Pierce's tortious conduct that makes it impossible to prove with certainty that the gift would have been realized. J. Howard placed a tremendous amount of trust in Pierce and Hunter who participated in acts intentionally designed to prevent J. Howard from giving Vickie a substantial gift or to undermine any will or gift that J. Howard signed when he was out of their presence. They presented documents for his signature which he was unable to read and signed

documents on his behalf. Had they acted according to his frequently stated wishes, rather than to protect Pierce's interest in MPI and the valuation of Koch Industries, there is a high probability that J. Howard would have made a substantial gift to Vickie.

C. Intentional Conduct

The evidence shows that Pierce and Hunter began undertaking estate planning transactions for J. Howard soon after they learned that he was seeking to make a substantial gift to her. All of these transactions were intended to drain J. Howard of his assets. Pierce's actions were intended to prevent a gift from being made to Vickie so as to not undermine the low valuations accorded to MPI and Koch stock. Allowing Vickie to have a gift based on the value of Koch stock could undermine his litigation position on the value of Koch stock with the dissident Koch shareholders and the IRS on gift and estate taxes. This would cost Pierce millions of dollars in tax litigation, and potentially endanger the liquidity of MPI. Thus, Pierce's actions were all made with the intention of preventing J. Howard from making a gift to Vickie.

D. Tortious Conduct

A defendant's conduct must be "independently tortious in character." Rest.2d Torts § 774B, cmt. c. Evidence of Pierce's tortious conduct is legion. Acting in concert with Hunter, they backdated documents, altered documents, destroyed documents, suborned falsified notary statements, presented documents to J. Howard under false pretenses, and committed perjury.

E. Damages

1. Entitlement

Vickie was damaged in the amount that J. Howard intended to give her. In December 1992, J. Howard told Harvey Sorensen that he wanted to give Vickie one-half of his "new community." (Ex. 62.) "New community" was a term J. Howard had developed, originally related to his marriage to Betty. He wanted Vickie to share in the growth of the assets that he owned and controlled during the time of their marriage. (Ex. 62.) The primary asset he held was his interest in Koch stock, held through MPI.

MPI holds 862,535 shares of Koch common stock, and has held that stock since at least the late 1980's. Prior to August 1993, when Pierce's string of estate planning changes began, J. Howard owned 164,252 shares of the then 236,440 outstanding shares of MPI stock, or approximately 69.5% of MPI. Vickie is therefore entitled to 69.5% of the appreciation in value of the 862,535 shares of Koch stock between the date that she and J. Howard married on June 27, 1994 and his death on August 4, 1995.

Vickie argues that she is entitled to the appreciation in the value of those shares from December 22, 1992, the date the "New Community Memo" was sent. Vickie claims that memo represented a present intent on J. Howard's part to make a gift to Vickie. However, there is no question that the new community that J. Howard referred to was not actually created until J. Howard married Vickie.

The bankruptcy court awarded Vickie the appreciation from June 1994 to August 1999. Here, the ending date is less clear, because J. Howard's intent was to provide for Vickie in her retirement. Indeed the "New Community Memo" did not envision her being able to redeem the

warrants from MPI until 15 years after J. Howard and Eleanor died. Although J. Howard has passed on, Eleanor still lives a vibrant and active life, and the end-date is therefore unascertainable. That, however, cannot serve to benefit Pierce, as equity will not allow a tortfeasor to gain by his own tort. The ending date chosen is necessarily somewhat arbitrary. However, August 1999, just before the trial in this matter, is completely disconnected from J. Howard's intent. August 4, 1995 is a more appropriate date, as that is the date that Vickie's and J. Howard's "new community" ended.

Pierce cites *Jensen v. Jensen*, 665 S.W.2d 107 (Tex.1984), for the proposition that, under Texas law, the appreciation in value of separate property held during marriage remains separate property. Pierce's argument, however, misses the mark. While that is an accurate statement of the law, it is not an accurate statement of the issues involved in this case. Had the appreciation become community property under Texas Law, Vickie would be entitled to half regardless of any tortious activity by Pierce. Here, however, the appreciation is relevant because J. Howard intended to give to Vickie a gift, from his separate property, of half of the appreciation of Koch stock. Pierce's argument is therefore unavailing.

2. Valuation

Determining how much the stock in Koch Industries appreciated between June 27, 1994 and August 4, 1995 is an even more difficult task. Koch is a privately held corporation, thus the Court cannot determine the value based on market trades. Litigation over the value of Koch Industries has consumed the time of many of the individuals involved

in this case. Indeed, at one point in 1993, Merrill Lynch estimated that the value of Koch Industries was anywhere between $31.06 per share and $2,391.30 per share. (Ex. 681.)

Placing a value on a privately held corporation in general is a difficult task. Moreover, the Koch philosophy is vastly different from most businesses. Koch gives an extremely low rate of return to its shareholders in dividends, allowing the company to grow more rapidly. While that significantly reduces the present share value, it substantially increases the future value of the stock. The experts here have proffered testimony wildly at odds with each other.

i. Mike Hill

In the bankruptcy proceedings, Pierce offered the expert testimony of Mike Hill to show the valuation of MPI. This testimony was stricken by the bankruptcy court as a sanction for Pierce's discovery abuses, but is considered by this Court. Hill utilized the dividend yield method to calculate MPI's value. According to Hill, this was necessary because of the "onerous minority shareholder oppression options available to majority shareholders domiciled in the State of Kansas (like Koch . . .)." (AP 017175.) However, by using the dividend yield method, the per share value of a company like Koch – that issues a very small dividend and reinvests its profits – is lower than its "inherent" value.

According to Hill, the per share value of MPI[44] as of the date J. Howard and Vickie married was $31,613,322.10. (AP 017180, 017187.) As of J. Howard's death, Hill valued MPI at $29,703,096.75. Hill's valuation would therefore entitle Vickie to no compensatory damages.

ii. Wayne Elggren

Vickie presented Wayne Elggren as an expert on valuation. Elggren employed the guideline company method, whereby Koch's value was determined by reference to similar public companies in the field. Elggren did not calculate the value of MPI or Koch as of August 4, 1995. Elggren calculated the appreciation of J. Howard's approximately 70% interest in MPI from June 27, 1994 to August 30, 1999 (just before trial commenced in the bankruptcy court) at $899,508,268. The bankruptcy court awarded Vickie one-half of this amount, or $449,754,134, as compensatory damages.

iii. IRS Settlement

For several years, the Marshall family interests have been involved in various tax litigation matters with the IRS. The IRS has made an offer to settle those cases. (Ex. 3573.) That settlement includes an imputed value of MPI and Koch stock. These settlement offers provide an additional valuation for Vickie's share of MPI and Koch stock holding. Accordingly, the Court makes the following

[44] Hill valued MPI, not Koch Industries. However, because Koch Industries stock is the major asset of MPI, determining the growth in Koch Industries can be determined by reference to it. The fact that MPI did not appreciate suggests that neither did Koch.

calculations according to the values imputed by the IRS for Settlement purposes. (Ex. 3573, Schedule 9.)

On June 16, 1994, MPI had 222,535 shares of stock actually outstanding. The IRS value of MPI Voting Stock as of June 16, 1994 was $1,039.92 per share. Therefore, the IRS value of MPI as of June 16, 1994 was $231,418,597.20.[45] Because the IRS offer is premised on valuing MPI at 49% of the value of its Koch stock, the value of the Koch shares held by J. Howard through MPI can be set at $472,282,851.43 by dividing by 0.49.

On May 26, 1995, MPI had 208,470 shares of stock actually outstanding. The IRS value of MPI Voting Stock as of May 26, 1995 was $1,248.70. Therefore, the IRS value of MPI as of May 26, 1995 was $260,316,489. The value of the Koch stock held by J. Howard through MPI can therefore be set at $531,258,140.82

During the period of time covered by these transactions, MPI's interest in Koch appreciated by $58,975,289.39. The time period covered by these valuations is 344 days. Thus, the average daily appreciation of MPI's interest in Koch stock was approximately $171,439.79. J. Howard and Vickie were married during approximately this same period of time, and it is therefore fair to assume that the rate of appreciation during this period was approximately the same. By extrapolating the appreciation of the stock value during this time, the value

[45] The amount of outstanding voting and non-voting stock is not clear on the record. However, the voting stock is valued only slightly higher than the non-voting stock. Because of Pierce's tortious and wrongful conduct, the Court draws the inference against him and uses the higher value for its calculation.

according to the IRS settlement offer can be obtained. J. Howard and Vickie were married for 403 days. Thus, by multiplying the average daily appreciation of MPI stock during this period of time by 403 days, the Court finds that the appreciation in the value of MPI's interest in Koch stock was approximately $69,090,237.28.

Absent any fraudulent, wrongful, and tortious transactions, J. Howard would have owned 164,213 shares of MPI stock on June 27, 1994. Absent any fraudulent, wrongful, and tortious transactions, there would have been 236,600 shares of MPI outstanding as of June 27, 1994. Thus, on June 27, 1994, J. Howard would have owned approximately 69.4% of MPI stock. Absent any fraudulent, wrongful, and tortious transactions, J. Howard's ownership interest in MPI would have been identical at the time of his death on August 4, 1995.[46]

J. Howard's share of the appreciation in the value of MPI would therefore be approximately $47,952,304.03. Vickie is entitled to one-half of J. Howard's share of the appreciation of MPI's interest in Koch stock. Using the

[46] The IRS settlement offer reflects several sales of stock by J. Howard to Pierce and sale of stock to MPI to cancel J. Howard's outstanding debt to MPI after August 20, 1993. As set forth above, Pierce's tortious conduct began to effect J. Howard's estate planning transactions in August 1993. Thus, the transactions after that date are tainted by Pierce's fraud, and are discounted by the Court. However, the offer does reflect the distribution to Pierce of 160 shares of MPI stock as compensation. Because Pierce had been receiving MPI stock distributions as part of J. Howard's long-held estate planning, the Court does include that transaction in its calculation. Additionally, the offer reflects a gift by J. Howard to "EM, PM, PM" on December 28, 1993. Because these appear to be legitimate Christmas gifts to J. Howard's family members, the Court does include that transaction in its calculation.

IRS Settlement numbers, this amount would be $23,976,152.02.

Although the IRS settlement is a reasonable method for calculating damages, the Court considers it inequitable to do so because it was negotiated by Edwin Hunter. As detailed above, Hunter was a key player in Pierce's tortious interference and the Court has no confidence in his credibility. Accordingly, Pierce should not have the benefit of Hunter's efforts in this Court.

iv. Book Value

The book value of MPI's interest in Koch stock is recorded in two credit approval presentations to Texas Commerce Bank. (Exs. 684, 685.) These presentations show a value of MPI's Koch stock of $664.4 million as of December 31, 1994 (Ex. 685) and $780 million as of December 31, 1995. This shows an annual appreciation of $115,600,000 and an average daily appreciation of $316,712.33. Because these valuations were taken near the time of J. Howard's marriage and death, it is fair to assume that the average daily appreciation during this time was the same as that during J. Howard's marriage to Vickie. Thus, the Court can extrapolate the appreciation of MPI's interest in Koch Industries during their marriage at $127,635,068.49. As noted in Part II.E.2.iii, *supra*, J. Howard's ownership interest in this would be approximately 69.4%, or $88,585,534.67. Vickie would be entitled to one-half of this, or $44,292,767.33.

The Court returns to first principles. "Fair Market Value" is defined as "[t]he price that a seller is willing to accept and a buyer is willing to pay on the open market in an arm's-length transaction." Black's Law Dictionary 1549

(7th ed.1999). Thus, while appraisers can estimate value, and several have attempted to do so in this case, the Court recognizes that the only real determination of value is when a sale takes place. Such a transaction ordinarily takes place after an often prolonged negotiation between buyer and seller, with each side attempting to create the best deal for themselves. Although no such situation presents itself in this case, resorting to the book value gives the Court some indication of the proper amount. The book value of the stock represented the collateral that MPI relied on for its line of credit. J. Howard and Texas Commerce Bank thought that book value was a sufficient valuation for regular business purposes. Pierce continued to rely on this when he took over MPI upon J. Howard's death. Indeed, the reports produced by Texas Commerce bank note that, as a privately held company, access to Koch's audited financial statement is limited and that historically the bank received updates of Koch's financial performance from Pierce. (Exs.684, 685.)[47] Accordingly, the Court accepts the book value of MPI as the appropriate measure of damages to be awarded to Vickie.

The Court finds itself in the quandary of finding that the facts are much more egregious than even the bankruptcy court suspected and found, yet awarding a substantially smaller amount of damages. However, the Court is

[47] Pierce contended at trial that based on the collateral of Koch stock, Texas Commerce Bank would agree to expand MPI's line of credit to cover the amount that it would owe to J. Howard between 1996 and 2001 for the sale of the Private Annuity, had he lived. That amount would be approximately $10 million per year, or $50 million between 1996 and 2001. Thus, if Pierce believed that Texas Commerce Bank was willing to extend MPI an additional $50 million line of credit, he must have also placed some reliance on the book value of MPI's Koch stock.

bound to the facts that show that Vickie is entitled to a smaller, but still substantial, award.

F. Punitive Damages

"On a showing in a tort action that a defendant acted willfully, maliciously, fraudulently, or with gross negligence, there may be a recovery of exemplary damages, in addition to compensatory damages." *King*, 725 S.W.2d at 755; *see also* TexCiv.Prac. & Rem.Code Ann. § 41.003 (Vernon 1997). Willful, malicious, and fraudulent conduct must be shown by clear and convincing evidence. TexCiv.Prac. & Rem.Code Ann. § 41.003(b). Here, the evidence of willfulness, maliciousness, and fraud is overwhelming. Pierce and Hunter engaged in a pattern of deceiving J. Howard for nearly two years. They presented documents under false pretenses, suborned perjured notary oaths, falsified and backdated documents, and altered documents, all with the intent of denying Vickie the gift that J. Howard intended to make to her. Pierce was the primary beneficiary of these acts. Pierce had private investigators follow J. Howard when he left Texas to visit Vickie. In support of their plans, Hunter considered abusing the high office of a federal judge. Pierce's conduct continued even after J. Howard was dead, as he participated in a plan to solicit a federal judge and appears to have altered the Renunciation document in February 1996.

Exemplary damages are levied against a defendant as punishment for outrageous behavior and malicious, fraudulent or other culpable conduct. *Trans. Ins. Co. v. Moriel*, 879 S.W.2d 10, 16 (Tex.1994). Like criminal penalties, the goal of punitive damages is to punish the defendant for his wrongful conduct. *Id.* Pierce now owns and

controls all of Trof, Inc., MPI's successor in interest, which includes all the interest in Koch Industries that J. Howard held. MPI was valued at more than $260 million by the IRS six years ago. Furthermore, he holds additional amounts of Koch stock that he received either from J. Howard or acquired in other ways through the years. He also apparently has other significant holdings from his past employment as CEO of Electron Corp., and other interests unknown to the Court. In short, Pierce Marshall is an extremely wealthy individual. Small and nominal amounts will do little to deter wrongful conduct, and a substantial sum is warranted for the pattern of malicious conduct that continued on for several years.

In determining the amount of punitive damages to award, the Court must consider the reprehensibility of the defendant's conduct and the harm inflicted on the defendant, *In re Exxon Valdez,* 270 F.3d 1215, 1240-41 (9th Cir.2001), as well as the defendant's wealth, to determine the appropriate level of punitive damages. Here, the level of misconduct is far worse than even the bankruptcy court, which awarded $25 million in punitive damages, believed was present. The alteration of documents was not limited to the living trust and the plans to interfere with the administration of federal courts were hidden until discovery was finally extracted. Only because the Court recognizes that the amount of punitive damages must have a rational nexus to the actual damage award does the Court limit the total award to a doubling of the actual damages.

Accordingly, the Court assess punitive damages in the amount of $44,292,767.33.

CONCLUSION

Any conclusion of law erroneously labeled herein as a finding of fact shall be deemed a conclusion of law. Any finding of fact erroneously labeled herein as a conclusion of law shall be deemed a finding of fact.

The Court finds and concludes that Vickie is entitled to judgment against Pierce on her counterclaim for tortious interference with an inter vivos gift, and awards compensatory damages in the sum of $44,292,767.33, plus costs of suit, plus punitive damages in the amount of $44,292,767.33.

IT IS SO ORDERED.

264 B.R. 609

United States District Court,
C.D. California.
In re Vickie Lynn MARSHALL, Debtor.
E. Pierce Marshall, Appellant,
v.

Vickie Lynn Marshall, Appellee.
Vickie Lynn Marshall, Cross-Appellant,
v.
E. Pierce Marshall, Cross-Appellee.
No. SA CV 01-97 DOC.
Bankruptcy No. LA-12510 SB.
Adversary No. 96-1838 SB.

June 19, 2001.

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AMENDED *ORDER* REGARDING SUBJECT MATTER JURISDICTION AND WHETHER THE TORTIOUS INTERFERENCE COUNTERCLAIM IS CORE OR NON-CORE

CARTER, District Judge.

In this appeal from the bankruptcy court, a litigant who filed a proof of claim and an adversary complaint to determine the dischargeability of a debt allegedly owed to

him by the debtor challenges a judgment entered against him on a counterclaim brought by the debtor. The debtor also cross-appeals. For the convenience of the Court and the parties, the Court instructed the parties initially to brief only two threshold issues. These issues are whether federal courts lack jurisdiction over this matter because of the probate exception to federal jurisdiction and whether the counterclaim is a core or non-core matter.[1] The bankruptcy court below held that the probate exception does not bar jurisdiction in this case and that the proceeding is a core matter. For the reasons that follow, the Court agrees that federal courts may exercise jurisdiction over this matter, but reverses the bankruptcy court's determination that this is a core matter.

I.

BACKGROUND

Appellee and Cross-Appellant Vickie Lynn Marshall ("Vickie")[2] is the surviving widow of J. Howard Marshall II ("J. Howard, Sr."), who died on August 4, 1995. Vickie and J. Howard, Sr. were married on June 27, 1994, after two and a half years of courtship. At the time of their marriage, Vickie was 26 years old and J. Howard, Sr. was 89 years old. Vickie, also known as Anna Nicole Smith, is a figure of some notoriety because of her career as a model. Prior to their marriage, J. Howard, Sr. had assisted in developing her career. J. Howard, Sr. is also a figure of

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[1] The Court heard oral argument on these issues on May 7, 2001.

[2] As all the principals in the matters at hand share the same last name, the Court will refer to the parties by their given names, as is customary in cases involving family members.

some notoriety in his own right, as he was said to be either the richest or second-richest man in Texas at the time of his death. His wealth was held in several different ways, including a living trust, and the exact amount and location of his wealth at the time of his death appears to be disputed. It seems clear that he was worth at least $1.6 billion.

It is undisputed that J. Howard, Sr. lavished great sums of money on Vickie during their courtship and marriage. Nonetheless, he did not explicitly provide for Vickie in his will. However, according to Vickie, and as found by the bankruptcy court, J. Howard, Sr. promised Vickie that she would receive substantial wealth and be taken care of. J. Howard, Sr.'s sons from two former marriages, J. Howard Marshall III ("J. Howard, Jr.") and Appellant and Cross-Appellee E. Pierce Marshall ("Pierce"), contest whether J. Howard, Sr. ever made such promises.

The magnitude of the sums of money involved in J. Howard, Sr.'s estate has sparked intensely contested litigation on several fronts. First, some probate proceedings took place in Louisiana, but were dismissed some time ago. Second, the estate is currently going through probate in Texas. Trial in the probate proceedings has concluded, and the jury has returned a verdict, but apparently judgment has not yet been entered. Third, on January 25, 1996, a few months after J. Howard, Sr.'s death, Vickie filed for Chapter 11 bankruptcy here in the Central District of California.[3] This bankruptcy case engendered

[3] The bankruptcy court noted in one of its decisions that Vickie apparently filed for bankruptcy because, after not receiving an inheritance from J. Howard, Sr., she lacked money and also because a default

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two adversary proceedings with which this Court has had involvement. This Order refers to these two adversary proceedings as the "Hilliard adversary proceeding" and the "Pierce adversary proceeding."

The Hilliard adversary proceeding began in January 1998 when Vickie filed an adversary complaint against Finley Hilliard as trustee of the J. Howard Marshall Living Trust and as executor of the succession of J. Howard Marshall II, et al. On July 22, 1998, the Honorable William D. Keller issued an order withdrawing the reference to the bankruptcy court of this proceeding, which thereafter proceeded before Judge Keller. On March 10, 1999, Judge Keller stayed the proceeding, pending the outcome of either the Texas probate proceedings or the Pierce adversary proceeding.[4] On November 8, 1999, the proceeding was transferred to this Court.[5] The proceeding remains stayed.

The appeal currently before the Court concerns the Pierce adversary proceeding. This proceeding began in

judgment had been entered against her on claims brought by her former personal assistant or housekeeper. This claim subsequently settled.

[4] Judge Keller made this ruling in an order entered in case number CV 98-7686 WDK, which was the case number assigned to Pierce's original motion to withdraw the reference of the Pierce adversary proceeding.

[5] When it began its existence as an adversary proceeding in the bankruptcy court, the Hilliard adversary proceeding had adversary number AD 98-1159 SB. After the reference was withdrawn but while the Hilliard adversary proceeding was still before Judge Keller, the proceeding had case number CV 98-4398 WDK. After being transferred to this Court, the Hilliard adversary proceeding was assigned case number SA CV 99-1372 DOC. This is the current, operative number for the Hilliard adversary proceeding.

1996, a couple of years prior to the instigation of the Hilliard adversary proceeding. On May 7, 1996, Pierce filed an adversary complaint seeking a determination that Vickie owed him a debt that was nondischargeable. Pierce alleged that Vickie had defamed him when, prior to the time she filed for bankruptcy and with her complicity, some of her lawyers told members of the press that Pierce had used forgery, fraud, and overreaching to gain control of Howard's assets.[6] On June 11, 1996, Pierce filed a proof of claim in the bankruptcy case. He made the claim by attaching a copy of the complaint from his adversary proceeding.

Vickie responded to both the adversary complaint and the proof of claim. As to the adversary proceeding, on June 14, 1996 she answered, in part asserting truth as a defense. She also asserted counterclaims for fraudulent transfer, an injunction, conversion, tortious interference with inheritance, breach of fiduciary duty, abuse of process, fraud, promissory estoppel, breach of contract (third-party beneficiary), the imposition of a constructive trust, an accounting, and indemnity and contribution. As to Pierce's proof of claim, Vickie filed an objection on July 3, 1996.

On September 22, 1998, Pierce filed a motion to withdraw the reference for his adversary proceeding. This motion was assigned to Judge Keller for determination. Judge Keller issued a ruling on October 21, 1998, but he

[6] Debts based on "willful and malicious injury," such as intentional torts, are not dischargeable. 11 U.S.C. § 523(a)(6). Damages for libel or defamation are not dischargeable when the statements were published with knowledge of their falsity. *Wheeler v. Laudani*, 783 F.2d 610, 615 (6th Cir.1986).

then vacated that order and issued a new ruling on March 10, 1999. The March 10, 1999 ruling denied Pierce's request to withdraw the reference. The effect of this ruling was that the Pierce adversary proceeding remained in the bankruptcy court in its entirety.[7]

On November 5, 1999, the bankruptcy court granted summary judgment for Vickie on Pierce's claim. It found that Vickie had published no statements about Pierce, had not ratified any statements about Pierce made by her attorneys, and was not otherwise vicariously liable for any statements her attorneys had made about Pierce. Thus, it held that Vickie had not committed a willful or malicious act under 11 U.S.C. § 523(a)(6).

Vickie's counterclaims against Pierce went to trial in the bankruptcy court in the fall of 1999. Approximately ten months later, on September 27, 2000, the bankruptcy court issued a Memorandum of Decision Following Trial ("Original Decision"). The Original Decision held that Pierce tortiously interfered with Vickie's expectation of the inheritance she otherwise could have received through a widow's election. On October 6, 2000, the bankruptcy court issued an Amended Memorandum of Decision Following Trial ("Amended Decision"), which supercedes the Original Decision. *See In re Vickie Lynn Marshall*, 253 B.R. 550 (Bankr.C.D.Cal.2000). Based on the evidence at trial and in large part on facts found against Pierce as sanctions for his discovery abuses, the Amended Decision concludes not

[7] Judge Keller's March 10, 1999 order refers the Pierce adversary proceeding in its entirety back to the bankruptcy court. Specifically, the order states without limitation, "This Court's October 21, 1998 Order is vacated. Accordingly, Case No. CV 98-7686, *In re Vickie Lynn Marshall*, is referred back to the Bankruptcy Court."

that Pierce tortiously interfered with Vickie's expectation of an inheritance, but that he interfered with her expectation of an *inter vivos* gift. Specifically, the Amended Decision states:

> The court finds that Vickie had an expectancy to receive a substantial portion of J. Howard's wealth. J. Howard repeatedly told her that she would receive half of what he owned. While J. Howard never made a will with any provision for her, this was because his principal assets were already in the Living Trust. J. Howard's plan was to provide for Vickie from the Living Trust.
>
> In December, 1992 J. Howard instructed both Sorensen and Hunter to arrange a gift to Vickie from the Trust. J. Howard instructed Hunter, a tax and estate planning expert, to prepare a "catch-all trust" for Vickie. A few days later J. Howard instructed Sorensen to prepare the documents for a gift to Vickie of one-half of the future appreciation in J. Howard's interest in MPI stock.[8] No evidence has been offered that these instructions were ever rescinded.

Am. Decision at 7. After discussing the certainty of the gift and Pierce's tortious conduct to prevent it, the Amended Decision then concludes:

> Pierce has tortiously deprived [Vickie] of her expectancy of a substantial *inter vivos* gift from her deceased husband J. Howard.

[8] MPI, or Marshall Petroleum, Inc., is a privately held corporation that in turn owns stock in Koch Industries, Inc., an oil and gas corporation affiliated with the Marshall family.

> The court awards damages in the amount of $449,754,134, less any amount that Vickie actually recovers in the pending Probate Court action in Texas. In addition, Vickie is entitled to punitive damages in an amount that remains to be determined after her actual damages are calculated.

Am. Decision at 9.

Pierce then filed a motion to withdraw the reference, assigned to this Court for determination. Just prior to argument on that motion, the bankruptcy court issued a third order on November 21, 2000. This decision, the Supplemental Memorandum of Decision Following Trial ("Supplemental Decision"), does not supercede the Amended Decision, but instead supplements it by explaining that the bankruptcy court had determined that Vickie's counterclaims were core proceedings and by imposing punitive damages of $25 million. It requested further briefing regarding certain forms of injunctive relief requested by Vickie, discussed requests by the parties for revisions to its findings of fact and conclusions of law, and set a hearing for December 6, 2000.

This Court heard oral argument on Pierce's motion to withdraw the reference on December 11, 2000 and then took the matter under submission. It then requested further briefing regarding the jurisdictional issue raised by Pierce in his motion.

On December 29, 2000, the bankruptcy court issued an Order on Motion for Entry of Judgment ("Order Re Judgment"). In this order, the bankruptcy court addressed Pierce's contention that the probate exception bars federal jurisdiction over Vickie's counterclaim. The bankruptcy

court rejected this contention. It held that Pierce had waived any objections to jurisdiction and had consented to jurisdiction by filing a proof of claim. Further, it held that in any event, the counterclaim did not fall within the exception, assuming the exception applies to bankruptcy cases. The bankruptcy court also provided further explanation as to why it had determined the matter is a core bankruptcy matter. Finally, the bankruptcy court ruled that it was appropriate to enter final judgment. The bankruptcy court entered a final judgment that day. This appeal followed.

Before considering the appeal, this Court denied as moot Pierce's motion to withdraw the reference, in addition to several motions for leave to file interlocutory appeals filed by Pierce.

II.

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 158(a)(1), because the bankruptcy court has entered a final judgment in this adversary proceeding.

The Court reviews the bankruptcy court's legal conclusions *de novo*. Both subject matter jurisdiction and whether a proceeding is core or non-core are legal questions over which the Court exercises *de novo* review. *In re Castlerock Properties*, 781 F.2d 159, 161 (9th Cir.1986) (exercising *de novo* review over jurisdiction question, including core or non-core classification).[9]

[9] Vickie notes that a treatise submitted by Pierce as an exhibit states that unless the district court, on a motion to withdraw the

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If the Court determines that this is a core matter, it will then review the rest of the bankruptcy court's decision for abuse of discretion. If the Court determines that this is a non-core matter, it will review all aspects of the bankruptcy court's decision, including its factual findings, *de novo*. In non-core matters, the bankruptcy court cannot enter final judgment, and thus if this matter is non-core, the bankruptcy court's decision will be treated as proposed, rather than final.

III.

DISCUSSION

Two issues are presented on this first phase of the appeal. First, whether the probate exception to federal subject matter jurisdiction applies to bankruptcy proceedings and if so, whether this matter falls within that exception. Second, whether this matter constitutes a core or non-core matter.

In resolving these issues, the Court need consider only the counterclaim actually decided, tortious interference

reference, makes the determination that a proceeding is core or non-core, the bankruptcy court's determination "will be binding, subject only to conventional appellate review (if permission for interlocutory review is granted under § 158(a)) under the 'clearly erroneous' standard." 1 *Norton Bankruptcy Law and Practice* 2d § 4.26, at 461. This passage is somewhat opaque, is not supported by any citations in the treatise, and is contradicted by the sentence immediately preceding it in the treatise, which states, "The ultimate determination that a proceeding is core is reviewed *de novo*, like other jurisdictional findings." *Id.* at 460. The Court will follow the Ninth Circuit's approach and review the core or non-core determination *de novo*.

with the expectation of an *inter vivos* gift,[10] rather than all of Vickie's counterclaims. The bankruptcy court issued no ruling in favor of Vickie on any of her other counterclaims, and thus they are not before the Court on this appeal.[11] The theory of the *inter vivos* gift counterclaim is that J. Howard, Sr. placed most of his assets in a living trust prior to his death and that he intended to set up, prior to his death, a structure whereby Vickie would be provided for out of that living trust.

A. Probate Exception

Initially, the Court rejects two of Vickie's arguments. First, Pierce has not waived his objection to federal subject matter jurisdiction. While it may be true that it is disfavored for a party to wait until it has lost a case and then assert a lack of subject matter jurisdiction, lack of subject matter jurisdiction is in general a non-waivable defect. Further, while the motion Pierce attempted to bring regarding subject matter jurisdiction was properly rejected by the bankruptcy court for being untimely filed, his answer to Vickie's counterclaim does attack the court's jurisdiction. That the answer does not explicitly use the words "probate exception" is not material, as his answer

[10] While this counterclaim is titled "Tortious Interference With Inheritance," in the body of the counterclaim it alleges interference with expectancies of "inheritance and/or gift." As indicated, the final decision of the bankruptcy court concerned interference with Vickie's expectancy of a gift from J. Howard, Sr. before his death.

[11] Apparently, at the beginning of the trial in the bankruptcy court, Vickie's attorney stated, "[I]n effect what we're seeking is interference with an inter-vivos gift, we're not seeking interference with inheritance rights because there were no assets left at the time that [J. Howard, Sr.] passed." Vickie's Appendix at 139:2-6.

was sufficient to alert the court and the parties to the fact that he challenged the court's jurisdiction.

Second, the Court rejects the idea that Pierce "consented" to jurisdiction by filing a proof of claim. The notion of jurisdiction by consent, sometimes referred to as jurisdiction "by ambush," was used in bankruptcy law in the past, but the Supreme Court's ruling in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982) seems to contradict it. In addition, in so far as the issue is the actual subject matter jurisdiction of the federal courts, rather than just the bankruptcy court's power to enter a final judgment, such jurisdiction cannot be conferred by consent.

However, considering Pierce's jurisdictional objection on the merits, the Court rejects his position and concludes that federal courts, including both this Court and the bankruptcy court, may properly exercise jurisdiction over this matter.

It is commonly understood that the "probate exception" bars federal courts from probating a will. While at first glance this proposition may seem unremarkable, both the origin and scope of the exception are not entirely clear. As the Seventh Circuit has noted, "The probate exception is one of the most mysterious and esoteric branches of the law of federal jurisdiction." *Dragan v. Miller*, 679 F.2d 712, 713 (7th Cir.1982). In particular, the origins of the exception are rather murky. A historical explanation, involving the exclusive jurisdiction of the ecclesiastical courts in England at the time the Judiciary Act of 1789 was passed, is frequently proffered. *E.g.*, *Markham v. Allen*, 326 U.S. 490, 494, 66 S.Ct. 296, 298, 90 L.Ed. 256 (1946). However, there are potential problems with this explanation. *See*

Dragan, 679 F.2d at 713 (describing the historical explanation as "shoddy"). Further, the historical explanation does not offer a compelling reason or rationale for why the exception should be continued today.

Other possible explanations include the idea that probating a will is not a "case or controversy" within the meaning of Article III, or that the Tenth Amendment reserves probate matters to the states. *See Rice v. Rice Found.*, 610 F.2d 471, 475 n. 6 (7th Cir.1979) (Article III); *McCan v. First Nat'l Bank of Portland*, 139 F.Supp. 224, 228 (D.Or.1954) (Tenth Amendment), *aff'd*, 229 F.2d 859 (9th Cir.1956). These rationales may be more satisfying than the historical explanation as justifications for the probate exception today. However, the Supreme Court has never formally adopted one of these rationales. Also, these rationales conflict with authority that states that the doctrine is "judicially created." *E.g., Rice*, 610 F.2d at 474. If the doctrine stems from the Constitution itself, it is not judicially created.

It is also possible that while not being constitutionally compelled, the doctrine is a result of the principles of comity attendant to our federal system.

The lack of clarity surrounding the origin of the exception makes it difficult to resolve the threshold issue argued by the parties, which is whether the probate exception applies only to diversity jurisdiction or to all federal jurisdiction, including bankruptcy. As Vickie notes, nearly all of the cases applying or analyzing the probate exception arise under diversity jurisdiction. However, this fact alone does not resolve the question, because there are few non-diversity actions in which the issue could even arise. If the exception stems from a historical practice

embodied in the diversity jurisdiction statute, it perhaps would apply only to diversity jurisdiction. Similarly, if the exception is just a judicially created doctrine recognizing that the federal interests present in diversity cases are sometimes overshadowed by stronger state interests, it might not apply to cases in which the courts' subject matter jurisdiction derives from federal law, such as bankruptcy law. However, if the exception stems from Article III or the Tenth Amendment, it presumably would apply to any proceeding in federal court, regardless of the basis of the court's subject matter jurisdiction. *Cf. Sutton v. English*, 246 U.S. 199, 205, 38 S.Ct. 254, 256, 62 L.Ed. 664 (1918) ("[A]s the authority to make wills is derived from the states, and the requirement of probate is but a regulation to make a will effective, matters of strict probate are not within the jurisdiction of courts of the United States.").

Whatever the origin of the exception, the practical and structural considerations attendant to it in the diversity context seem equally likely to arise for any action in federal court, including bankruptcy matters. The legal certainty that is of extra importance when dealing with matters of inheritance, the specialized nature of probate law and the corresponding expertise of probate court, the idea that normally probate matters are of local concern only, and the judicial economy that stem from limiting litigation involving one decedent's estate to one forum, particularly the forum that has asserted *in rem* jurisdiction over the physical property of the decedent's estate, all are still of concern when dealing with bases of federal jurisdiction other than diversity.

Thus, it is the Court's opinion that the exception most likely applies to all matters in federal court, not just those

premised on diversity jurisdiction. However, the Court need not formally decide this issue, because even assuming the probate exception applies to this case, the counterclaim decided by the bankruptcy court does not fall within the exception.

In the leading Supreme Court case on the scope of the probate exception, the Court explained:

> It is true that a federal court has no jurisdiction to probate a will or administer an estate. . . . But it has been established by a long series of decisions of this Court that federal courts of equity have jurisdiction to entertain suits in favor of creditors, legatees and heirs and other claimants against a decedent's estate to establish their claims so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court.

Markham, 326 U.S. at 494, 66 S.Ct. at 298; *see also Sutton*, 246 U.S. at 205, 38 S.Ct. at 256 (stating that suits that can "be determined without interfering with probate or assuming general administration, are within the jurisdiction of the federal courts").

Here, the bankruptcy court did not assert jurisdiction generally over the probate proceedings for J. Howard, Sr. or take control over his estate's assets, which are a part of the *in rem* jurisdiction of the Texas court administering his probate proceedings. Thus, the probate exception would bar federal jurisdiction over Vickie's counterclaim only if such jurisdiction would "interfere" with the probate proceedings. *Markham*, 326 U.S. at 494, 66 S.Ct. at 298.

Pierce argues that the counterclaim interferes with the Texas probate proceeding because the issues addressed are similar or related. However, courts hold that a matter must be more than merely related to a probate proceeding to fall within the exception and hence not be within the power of a federal court. The Seventh Circuit has grouped federal courts' decisions regarding the probate exception into two categories. *See Rice*, 610 F.2d at 476. In the first of these categories, the test used is whether the claim rests on an assertion that the will is invalid. *Id.* In the second, the test used is whether under the law of the state administering the probate, the claim could be brought only in the probate court, as opposed to a state court of general jurisdiction. *Id.* The tests are not entirely distinct from each other and courts do not always identify if they are applying one or the other. In substance, both tests are frameworks for analyzing and answering the overarching question, which is whether the assumption of federal jurisdiction will interfere with state probate proceedings. The Ninth Circuit has never explicitly adopted either test.

Under the first test, Vickie's counterclaim for interference with her expectation of an *inter vivos* gift does not fall within the exception. It is uncontested that the counterclaim does not rest on an assertion that J. Howard, Sr.'s will is invalid. On the counterclaim, Vickie makes no assertion regarding the validity of J. Howard, Sr.'s will, which left nothing to her. Whether Pierce interfered with J. Howard, Sr.'s plans to make a gift to Vickie through a trust arrangement is a determination that can be made completely independently from a determination of whether or not J. Howard, Sr.'s will is valid.

Also under the second test, Vickie's counterclaim does not fall within the exception. On the counterclaim, the

bankruptcy court found that J. Howard, Sr. intended to give Vickie a gift before he died:[12]

> In December, 1992 J. Howard instructed both Sorensen and Hunter to arrange a gift to Vickie from the Trust. J. Howard instructed Hunter, a tax and estate planning expert, to prepare a "catch-all trust" for Vickie. A few days later J. Howard instructed Sorensen to prepare the documents for a gift to Vickie of one-half of the future appreciation in J. Howard's interest in the MPI stock.

Am. Decision at 7. The bankruptcy court further found that Pierce interfered with J. Howard, Sr.'s plans:

> [Pierce] fired Sorensen for the purpose of preventing him from arranging the gift to Vickie of the increase in value of the MPI stock, and he conspired with Hunter to prevent the preparation of the catch-all trust. . . . [H]e caused the altering of [a document created regarding J. Howard, Sr.'s living trust, of which Pierce and his family were the sole beneficiaries] by substituting a new second page of the document after its apparent execution to insert a provision that purported to make the Living Trust irrevocable.

Am. Decision at 8.

[12] The bankruptcy court's factual findings include findings imposed as sanctions for Pierce's discovery abuses. Whether or not these sanctions were warranted and whether or not the bankruptcy court's factual findings were correct are issues that are not before the Court on this phase of this appeal. The Court here considers the findings of the bankruptcy court only as part of its analysis of the nature of Vickie's counterclaim.

Texas law does not require that this counterclaim be asserted in the probate court. Under the Texas Probate Code, a court exercising original probate jurisdiction has exclusive jurisdiction over "applications, petitions and motions regarding probate and administrations." Tex. Prob.Code Ann. § 5(c) (Vernon 1980). Pierce makes no argument that Vickie's counterclaim falls within this provision. Over other matters, probate courts and Texas courts of general jurisdiction, which in Texas are called district courts,[13] have concurrent jurisdiction. For example, probate courts and district courts have concurrent jurisdiction over "actions involving an *inter vivos* trust." Tex. Prob.Code Ann. §§ 5(d), 5A(c)(2) (Vernon 1980). However, there is a further provision regarding matters, such as Vickie's counterclaim, that are within the concurrent jurisdiction of both the probate and district courts. "In situations where the jurisdiction of a statutory probate court is concurrent with that of a district court, any cause of action appertaining to estates or incident to an estate shall be brought in a statutory probate court rather than in the district court." Tex. Prob.Code Ann. § 5A(b) (Vernon 1980). Pierce contends that this provision means that Vickie's counterclaim could not have been asserted in a Texas district court because, in Pierce's view, the counterclaim is a matter "appertaining to" or "incident to an estate."

The Texas Probate Code defines "appertaining to estates" and "incident to an estate" to include:

[13] Texas state district courts are of course separate and distinct from the United States District Courts in Texas. Throughout this section of this order, "district court" refers to a Texas state court of general jurisdiction, not a federal court.

> [T]he probate of wills, the issuance of letters testamentary and of administration, and the determination of heirship, and also . . . all claims by or against an estate, all actions for trial of title to land and for the enforcement of liens thereon, all actions for trial of the right of property, all actions to construe wills, the interpretation and administration of testamentary trusts and the applying of constructive trusts, and generally all matters relating to the settlement, partition, and distribution of estates of deceased persons.

Tex. Prob.Code Ann. § 5A(b) (Vernon 1980). It is uncontested that Vickie's counterclaim does not fall into any of these specific categories except possibly the last, "generally all matters relating to the settlement, partition, and distribution of estates of deceased persons." However, this is not an exclusive list, and thus even a matter not falling within one of the specifically enumerated categories could nonetheless be appertaining or incident to an estate.

However, Texas case law confirms that Vickie's counterclaim, under Texas law, is not appertaining or incident to J. Howard, Sr.'s estate. Texas courts hold that "[a]n action is 'incident or appertaining' to an estate when the outcome will have a direct bearing on the assimilation, collection, and distribution of the decedent's estate." *Falderbaum v. Lowe*, 964 S.W.2d 744, 747 (Tex.App.1998); *see also Crawford v. Williams*, 797 S.W.2d 184, 185 (Tex.App.1990) ("Matters incident to an estate includes those matters in which the controlling issue is the settlement, partition, or distribution of an estate."). Here, Vickie's counterclaim is asserted against Pierce individually and makes no claim against the estate or even against the trusts existing at the time of J. Howard, Sr.'s death. In fact, Vickie's counterclaim is at least in part premised on

the theory that she is entitled to nothing either from the living trusts or from the estate itself. Her theory is that Pierce prevented J. Howard, Sr. from including her in the living trusts. Thus, it is entirely possible that the trusts, as currently structured, are legally valid but also that Pierce owes Vickie damages for preventing J. Howard, Sr. from structuring the trusts in another way.

The Texas cases cited by Pierce are inapposite because they concern claims regarding an estate itself, rather than against a person individually for actions taken prior to the decedent's death. *E.g., Bailey v. Cherokee County Appraisal Dist.*, 862 S.W.2d 581, 585 (Tex.1993) (holding that taxes accruing on estate property after death are a claim against the estate and that a suit to collect them is therefore "incident to an estate"); *Perfect Union Lodge No. 10 v. Interfirst Bank of San Antonio*, 748 S.W.2d 218, 221 (Tex.1988) (holding that the interpretation of a testamentary trust is "incident to an estate"); *In the Matter of the Estate of McGarr*, 10 S.W.3d 373, 379 (Tex.App.1999) (holding that an action seeking an inventory, accounting, and distribution of an estate was "appertaining to an estate"); *Crawford*, 797 S.W.2d at 185-86 (holding that an action for turnover of estate property, an accounting, a declaration that a will was void for undue influence, and distribution as if the decedent had died intestate had to be brought in the probate court); *Boman v. Howell*, 618 S.W.2d 913, 915-16 (Tex.Civ.App.1981) (holding that a suit seeking declaratory judgment regarding the construction of a will had to be brought in the probate court); *Thomas v. Tollon*, 609 S.W.2d 859, 860 (Tex.Civ.App.1980) (holding that a suit seeking division of an estate was "incident to an estate").

These cases nicely set forth the rule that claims for matters incident to an estate should be brought in the probate proceeding, but they do not address the underlying question of whether Vickie's counterclaim constitutes a matter "incident to an estate." Pierce assumes this to be true without providing authority or argument in support of his position.

Other cases demonstrate that Vickie's counterclaim is not "incident to an estate." In *Sobel v. Taylor*, 640 S.W.2d 704, 706 (Tex.App.1982), one child of a decedent sued his two siblings, also children of the decedent, for alleged misdeeds both as co-trustees of the decedent's trust before his death and as co-executors after the decedent's death. The allegations were similar to those Vickie has made against Pierce: mismanagement of the trust, fraud, and self-dealing. *Id.* The Court of Appeals of Texas held that the suit was not "incident to an estate," and therefore could proceed independently in the district court, rather than the probate court, because the alleged actions occurred prior to the decedent's death and because the damages sought were from the co-trustees and co-executors in their individual capacities, rather than a distribution from the trust itself or the decedent's estate. *Id.* at 707. The same is true of Vickie's counterclaim.

Similarly, in *Jansen v. Fitzpatrick*, 14 S.W.3d 426, 434 (Tex.App.2000), the court held that the district court had jurisdiction over claims more directly related to a probate proceeding than is Vickie's counterclaim. The decedent in *Jansen* had prepared a will naming certain individuals as residuary beneficiaries who, under the will, would receive shares in certain real property owned by the decedent. *Id.* at 429. Subsequent to the preparation of this will and two months before her death, the decedent gave the real

property to her niece. *Id.* After the decedent's death, the residuary beneficiaries sued the niece in district court, seeking to have the deathbed conveyance set aside on the grounds that the decedent was incompetent at the time she made the conveyance and under the undue influence of the niece. *Id.* at 430. The district court's jurisdiction was upheld by the court of appeals, although it was challenged on grounds other than those at issue here. *Id.* at 432-33.

Pierce attempts to distinguish *Sobel* and *Jansen* on the grounds that those suits were against executors and a specific provision of the Texas Probate Code provides for concurrent jurisdiction over actions against executors. *See* Tex. Prob.Code Ann. § 5(d) (Vernon 1980). However, neither the *Sobel* nor *Jansen* court relied on this provision in analyzing whether the claims at issue were "incident to an estate." Further, the statutory provision cited by Pierce also provides for concurrent jurisdiction over actions "involving an *inter vivos* trust," and under Pierce's characterization of Vickie's counterclaim, which differs from the Court's, her claim would fall within this provision.

Pierce also argues that Texas's "dominant jurisdiction" theory, under which the first court to assert jurisdiction over a matter exercises that jurisdiction to the exclusion of all other courts, means that once the Texas probate proceeding was pending, no Texas district court could have heard Vickie's counterclaim. However, this rule is subordinate to the test for whether an action is appertaining or incident to an estate. Thus, if an action is appertaining or incident to an estate and a probate proceeding is pending, under the doctrine of dominant jurisdiction no other court can exercise jurisdiction over matters appertaining or incident to the estate. However, other courts may exercise jurisdiction over matters that are not incident to the

estate. *See Falderbaum*, 964 S.W.2d at 747 (holding that a district court "was not required to abate" an action brought under concurrent probate and district court jurisdiction because the action was not incident to the estate). Here, under the authority of *Sobel*, Vickie's counterclaim is not incident to J. Howard, Sr.'s estate, and hence the dominant jurisdiction doctrine does not apply to it.

Finally, Pierce also notes that under Texas law, a probate court may in some settings have the power to draw in an action pending in a district court on a transfer. Tex. Prob.Code Ann. § 5B (Vernon 1980). However, this provision is irrelevant both because such a transfer can be done only for matters incident to an estate and because that power does not negate the fact that if, for whatever reason, the probate court does not transfer in the action, the district court may continue to exercise jurisdiction over it.

Because, under Texas law, Vickie's counterclaim for tortious interference does not fall within the exclusive jurisdiction of a probate court, it does not fall within the probate exception to federal jurisdiction. Therefore, both the bankruptcy court and this Court have valid subject matter jurisdiction over this counterclaim.[14]

[14] Similarly, but considering Florida rather than Texas law, another federal court held that the probate exception did not bar federal courts from exercising jurisdiction over a claim for tortious interference with the expectation of an inheritance or gift when the plaintiffs alleged that the defendants "systemically and fraudulently acted to influence one Arthur Welch to revoke a last will and testament in which he had named the [plaintiffs] as substantial beneficiaries and to execute

(Continued on following page)

B. Core Versus Non-Core Distinction

Bankruptcy courts may exercise plenary powers only over "core" bankruptcy matters. Over matters that are not core, bankruptcy courts may not enter final judgment, but may only issue proposed findings of fact and conclusions of law. These are reviewed *de novo* by the district court, which then enters final judgment. The bankruptcy court determined that Vickie's counterclaim is a core matter. Pierce disputes this determination.[15]

As in the preceding discussion of jurisdiction, the Court rejects Vickie's suggestion that merely by filing a proof of claim, Pierce subjected himself to the bankruptcy court for all purposes. This theory does not appear to be to the current state of the law. First, the nature of Pierce's claim against Vickie must be analyzed separately from Vickie's counterclaim against Pierce. Otherwise, the body of law that has developed for analyzing counterclaims would be superfluous. Second, whether or not a certain proceeding is core or non-core is a legal question dependant on the issues raised and the procedural posture of the proceeding; a proceeding cannot be transformed from being non-core to being core through consent or waiver. It would go against *Marathon* to hold that by filing a proof of claim, a creditor consents or waives any objections to core

instead a will for the benefit of [defendants]." *DeWitt v. Duce*, 599 F.2d 676, 677 (5th Cir.1979).

[15] If Pierce is correct, this Court will exercise *de novo* review over the other aspects of the bankruptcy court's decision, which are not addressed in this order. If the bankruptcy court and Vickie are correct, this Court will review the other aspects of the bankruptcy court's decision for abuse of discretion.

treatment.[16] Consent is relevant to the discussion only in that a party may consent to the bankruptcy court issuing final judgment in a non-core matter, thereby rendering any distinction between whether that proceeding is core or non-core meaningless. However, such consent must be express, not implied. Fed. R. Bankr. P. 7012(b). While he failed either to admit or deny that Vickie's counterclaims are core in his answer, Pierce has never expressly consented to the bankruptcy court entering final judgment.[17]

Initially, Pierce argues that 28 U.S.C. § 157(b), which identifies certain types of proceedings as core, is not "jurisdictional." The word "jurisdiction," which is used in different ways in different contexts, has three relevant meanings or applications in the bankruptcy context. First, a characteristic that would deprive all federal courts of subject matter jurisdiction, such as the probate exception, deprives bankruptcy courts of subject matter jurisdiction. Second, bankruptcy courts, as adjuncts to the district courts, may only exercise "jurisdiction" over the matters given to them by statute. *See* 28 U.S.C. § 1334. Jurisdiction

[16] Vickie argues that *Langenkamp v. Culp*, 498 U.S. 42, 44, 111 S.Ct. 330, 331, 112 L.Ed.2d 343 (1990) supports her position. In that case, decided after *Marathon*, the Supreme Court held that after a creditor files a proof of claim, a preferential transfer action asserted in response by the debtor becomes a part of the allowance or disallowance of that claim and there therefore is no right to a jury trial. However, the Court framed the issue in terms of the nature of the claims, not consent. *Id.*

[17] Pierce's attorney once stated at a hearing in the bankruptcy court that Pierce would be "happy" and "pleased" to litigate in the bankruptcy court. Pierce's Appendix at 190-95. The most logical interpretation of these statements, in the context in which they were made, is that he was referring only to litigation of Pierce's claim and the dischargeability determination, not to Vickie's counterclaim.

in this second sense of the word is quite broad, covering all core matters and all non-core, "related" matters, but some matters may involve the debtor or the bankruptcy proceeding so tangentially that they are not even "related to" the bankruptcy case. Third, in so far as the word "jurisdiction" is used to mean the bankruptcy court's power to enter a final judgment, the bankruptcy court does not have "jurisdiction" to enter final judgments in non-core matters. However, while a bankruptcy court may not enter final judgment in a non-core matter, it may certainly exercise "jurisdiction" over the matter in the sense of hearing and presiding over the matter up to the point when it presents proposed findings of fact and conclusions of law to the district court.

Thus, Pierce's argument that § 157(b) is not "jurisdictional" is true in a certain sense but is somewhat beside the point. Section 157 governs the determination of whether a matter is core or non-core. The bankruptcy court has jurisdiction over both core and non-core matters. Having determined that Vickie's counterclaim does not fall within the probate exception to federal subject matter jurisdiction, the Court has disposed of all "jurisdictional" objections to this case. This is so because, at the least, Vickie's counterclaim is "related to" Vickie's bankruptcy case. "Related to" jurisdiction is very broad, covering any matter that "conceivably" could have an impact on the estate or the administration of it. *In the Matter of Wood*, 825 F.2d 90, 93 (5th Cir.1987). Vickie's counterclaim could have an impact on the estate as it could greatly increase the size of the estate.

However, for the reasons that follow, while it is a "related" matter, Vickie's counterclaim is not a core bankruptcy proceeding.

Any discussion of the distinction between core and non-core matters must start with the Supreme Court's decision in *Marathon*. In this case, the Supreme Court considered the constitutionality of the Bankruptcy Act of 1978, the precursor to the modern bankruptcy code. A plurality of the Court held that it was unconstitutional to vest full and final authority over any matter conceivably related to a bankruptcy case in non-Article III judges, because under the Constitution, the "judicial power" of the United States, if vested in lower federal courts at all, must be vested in courts with Article III safeguards. *Marathon*, 458 U.S. at 84-87, 102 S.Ct. at 2878-80. Because of its Article I power to determine the substantive components of bankruptcy law, Congress may provide that bankruptcy judges can exercise full authority over those bankruptcy proceedings that are so closely related to substantive bankruptcy law and procedures that they can be said to be "core" bankruptcy matters. *Id.* However, Congress may not, through statutory enactments, give Article I bankruptcy judges the power to render final judgments over matters that are not directly connected to the bankruptcy code. *Id.*

The modern bankruptcy code's distinction between core and non-core "related" matters is a direct response to the constitutional concerns addressed in *Marathon*. Specifically, the code provides:

> Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11 . . . and may enter appropriate orders and judgments, subject to [appellate] review under section 158 of this title.

28 U.S.C. § 157(b)(1). Thus, Congress defined "core" matters as "cases under title 11" and "core proceedings arising under title 11[ ] or . . . in a case under title 11." *Id.* The legislative history indicates that through this definition, Congress intended for bankruptcy judges to exercise final authority over as many matters as constitutionally possible.

Proceedings "arising under" title 11 are those substantive claims for relief that are based on rights expressly granted by title 11, the bankruptcy code. *In the Matter of Wood*, 825 F.2d at 96. This provision functions analogously to 28 U.S.C. § 1331, which grants federal courts jurisdiction over claims "arising under" the Constitution or laws of the United States. *Id.; see also* 1 Lawrence P. King, *Collier on Bankruptcy* ¶ 3.01 [4][c][i] (15th ed.2000). Proceedings "arising in" a case under title 11 are procedural actions that could only happen in a bankruptcy case. The Fifth Circuit has explained:

> The meaning of "arising in" proceedings is less clear, but seems to be a reference to those "administrative" matters that arise *only* in bankruptcy cases. In other words, "arising in" proceedings are those that are not based on any right expressly created by title 11, but nevertheless, would have no existence outside of the bankruptcy.

In the Matter of Wood, 825 F.2d at 97; *see also Collier, supra* ¶ 3.01[4][c][iv] (referring to actions "arising in" as a "residual category").

Both "arising under" and "arising in" proceedings can be distinguished from proceedings that are only "related to" the bankruptcy case. "Related to" proceedings are

substantive claims for relief based upon non-bankruptcy law that could have been the subject of an independent lawsuit absent the filing of a bankruptcy case. *Collier, supra* ¶ 3.01[4][c][iv]. In general, the distinction is stated as follows: if a cause of action is not dependant on the bankruptcy code for its existence, but could have been asserted as an independent lawsuit absent the filing of a bankruptcy case, it is a non-core, related matter. *In the Matter of Wood*, 825 F.2d at 96-97. This distinction stems from the constitutional requirements set forth in *Marathon*.

Considering these general definitions of "core" and "arising under" and "arising in," Vickie's counterclaim appears to be non-core. Substantively, the counterclaim is based entirely on state law. If she had not filed for bankruptcy, she could have asserted the counterclaim in an independent lawsuit against Pierce. Her counterclaim is not based on a right granted by bankruptcy law.

The analysis cannot end here, however. Many of the claims that are litigated in a bankruptcy case could have been separate lawsuits if no bankruptcy petition had ever been filed. This alone does not render the claims non-core, because such a result would eviscerate most of bankruptcy law itself. As stated by Representative Kastenmeier in the legislative history:

> State law rights arising in core bankruptcy proceedings are functionally equivalent to congressionally created rights, because Congress has the power to modify State law rights in bankruptcy proceedings. Unlike the States, Congress may impair the obligations of contracts through the bankruptcy clause. Indeed, the very purpose of bankruptcy is to modify the rights of debtors and

> creditors, and the bankruptcy code authorizes the bankruptcy court to abrogate or modify State-created obligations in many ways.

130 Cong. Rec. H1110 (daily ed. Mar. 20, 1987) (quoted in *Collier, supra* ¶ 3.02[2]). Thus, in determining whether a claim is core or non-core, courts must consider both the substantive nature of the claim and the procedural posture whereby it is asserted. For example, the filing of a proof of claim creates a bankruptcy core proceeding even though the underlying state law claim would not have been. *In re Bellucci*, 119 B.R. 763 (Bankr.E.D.Cal.1990).

In making this analysis of both the substantive and procedural aspects of the proceedings at issue, courts look to 28 U.S.C. § 157(b)(2), in which Congress set forth a list of specific matters it viewed as core.[18] The only provision of § 157(b)(2) that is relevant to Vickie's counterclaim is § 157(b)(2)(C), which states that "counterclaims by the [debtor's] estate against persons filing claims against the [debtor's] estate" are core proceedings.[19] Counterclaims can be core under this definition when they "arise in" a bankruptcy case. The bankruptcy court held that because of this provision, Vickie's counterclaim is core.

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[18] Proceedings not specifically listed in the statute may still be considered core. The statute itself has a "catch-all" provision, and also it states that core proceedings "include" those specifically enumerated. 28 U.S.C. § 157(b)(2).

[19] Vickie also argues that her counterclaim is core as a turnover proceeding under 28 U.S.C. § 157(b)(2)(E). However, the counterclaim ruled on by the bankruptcy court addressed whether Pierce owes Vickie damages in an individual capacity and did not address, for example, turnover of community property already belonging to Vickie. Therefore, the counterclaim cannot be characterized as a turnover proceeding and cannot receive core treatment on that grounds. *In re Kincaid*, 917 F.2d 1162, 1165 (9th Cir.1990).

On first impression, the bankruptcy court's decision appears correct. First, the Court agrees with the bankruptcy court that Vickie's counterclaims are not rendered outside the scope of § 157(b)(2)(C) solely because they were brought against Pierce's adversary complaint, rather than against his actual proof of claim. The Pierce adversary proceeding began with an adversary complaint filed by Pierce seeking a determination of dischargeability and a proof of claim, which stated that the amount of his damages was "unliquidated" and to which was attached a copy of his nondischargeability adversary complaint. Vickie answered the complaint and filed counterclaims against it, and she objected to the proof of claim. Numerous courts have found claims asserted by the debtor against a person who has filed proofs of claims against the estate to be counterclaims within the meaning of this section, and therefore core proceedings, even though the claims were asserted by procedures other than counterclaiming against the proof of claim itself. *See, e.g., In re Carrington Gardens Assocs.*, 248 B.R. 752, 766-67 (Bankr.E.D.Va.2000) (holding that a creditor had "waived its right to limit or bar the bankruptcy court from hearing counterclaims to" its proof of claim against the debtor because, "[b]y filing its proof of claim," it "in essence converted [the debtor's] adversary proceeding . . . [to] a counter claim").[20]

[20] For similar cases, see *In re Performance Nutrition, Inc.*, 239 B.R. 93, 99 (Bankr.N.D.Tex.1999) (holding that claims in a bankruptcy trustee's adversary complaint against two persons who had filed proofs of claims against the estate were counterclaims); *Allen v. City Finance Co.*, 224 B.R. 347, 352 (S.D.Miss.1998) (holding that claims asserted in a complaint filed by the debtor against a creditor who had filed proofs of claim "were, in essence," counterclaims against the creditor); *see also Pan American World Airways, Inc. v. Evergreen Intern. Airlines, Inc.*, 132 B.R. 4, 7 (S.D.N.Y.1991) (holding that claims in a complaint

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Second, the Court rejects Pierce's argument that he sought only a determination of dischargeability and did not actually make a claim against Vickie's estate. It is true that a nondischargeability complaint does not automatically include or subsume the underlying claim but is instead a separate, theoretically distinct claim. *In re Thrall*, 196 B.R. 959, 967-68 (Bankr.D.Colo.1996). However, here Pierce filed a proof of claim in addition to his nondischargeability complaint. On that proof of claim, he stated that he had a claim for an "unliquidated" amount. He nonsuited Vickie from his then-pending state court defamation action, and he never sought relief from the automatic stay. As his counsel explained at a hearing in the bankruptcy court on a motion brought by Pierce to dismiss or stay Vickie's counterclaims, Pierce "took" his substantive defamation claim and "put" it into the form of the nondischargeability adversary complaint:

> A lawsuit for libel or slander was filed prepetition in Dallas County. The Debtor filed bankruptcy in January. And that matter was stayed. The trial counsel nonsuited the Debtor. We took the claims against the Debtor that were set forth in the . . . slander action, put them into a nondischargeability complaint – . . . . So the allegations that formed the state court petition for libel and slander, as they related to the Debtor, were then taken and put into the nondischargeability complaint, which we filed here in this Court. Now, it was filed as a nondischargeability complaint because we believe that there's evidence to demonstrate [that

initiated by the debtor against an entity that had not yet filed a proof of claim in the bankruptcy proceeding, but intended to do so, were counterclaims within the meaning of § 157(b)(2)(C)).

> Vickie acted willfully and maliciously]. So, under 523, it was like a dischargeability complaint and it was filed here.

Vickie's Appendix, Tab 7, at 4:8-14; 6:14-7:1. Later in the same hearing, Pierce's counsel stated that he "has assumed . . . that if the Court was going to stay the counterclaims, you would have stayed the entire adversary proceeding, *which included the slander lawsuit* that was filed under 523. . . . [W]e'd be happy to stay *both halves* of the action. . . ." *Id.* at 20:17-25 (emphasis added). Thus, given that he filed a proof of claim in addition to his nondischargeability adversary complaint, and given that he never tried to continue to pursue the substantive aspect of his defamation claim against Vickie elsewhere, Pierce cannot now argue that he never made a claim against her estate.

Thus, Vickie's counterclaim for tortious interference falls within the literal language of § 157(b)(2)(C). However, most courts agree that the plain language of § 157(b)(2)(C) cannot be the end of the analysis, because such a construction would conflict with *Marathon*. In the statute, Congress set forth its view as to what matters fall within the constitutional parameters, but in interpreting the statute, courts must consider not just the literal language of the statute, but the constitutional concerns behind it. *In re Castlerock Properties*, 781 F.2d 159, 162 (9th Cir.1986). Specifically as to § 157(b)(2)(c), footnote 31 of the plurality opinion in *Marathon* suggests that it would be unconstitutional to hold that any and all counterclaims are core and therefore can be finally determined by a bankruptcy judge. *Marathon*, 458 U.S. at 79 n. 31, 102 S.Ct. at 2876 n. 31.

Thus, on the one hand, calling any counterclaim that falls within the literal language of the statute core seems

to contradict the holding of *Marathon*. On the other hand, calling any counterclaim that could have been asserted as an independent lawsuit non-core seems to render § 157(b)(2)(c) itself nugatory, because any counterclaim could have been asserted as a separate lawsuit absent the filing of the bankruptcy petition. *Collier* notes this problem and states that "[t]he matter is still unsettled." *Collier, supra* ¶ 3.02[3][d][i].

It appears that the justification for core treatment for counterclaims is a combination of judicial economy and efficiency for the litigants, in addition to recognition of the fact that practically, adjudication of a counterclaim that is closely related to a claim will almost merge into allowance or disallowance of the claim itself. *In re Castlerock*, 781 F.2d at 162.[21] Keeping these concerns in mind, courts have developed various doctrines for limiting the reach of § 157(b)(2)(C). For example, courts are loath to call counterclaims core when they are filed against a proof of claim that was filed "defensively" by a creditor who has already tried to have its claim determined by a court other than the bankruptcy court. *In re Castlerock*, 781 F.2d at 162. This exception does not apply in this case, because Pierce filed his proof of claim offensively.

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[21] The Ninth Circuit issued its opinion in *In re Castlerock* soon after the modern bankruptcy code was enacted. In this passage, it also states that "well-settled law" holds "that a creditor consents to jurisdiction over related counterclaims by filing a proof of claim." *In re Castlerock*, 781 F.2d at 162. However, the law it cites in support of this proposition is all pre-*Marathon*, and the court did not specifically consider the impact of *Marathon* on the prior practice of jurisdiction by consent. As indicated, this does not appear to be the law post-*Marathon*. However, the policy reason for the rule could still be the animating force behind § 157(b)(2)(C).

In addition, counterclaims that are permissive, rather than compulsory, do not receive core treatment. A compulsory counterclaim is one that arises out of the same factual transaction as the claim against which it is asserted. Fed.R.Civ.P. 13(a). The bankruptcy court held that Vickie's counterclaim arises out of the same transaction as Pierce's defamation claim. Pierce alleged that Vickie had acted willfully and maliciously by defaming him when her attorneys, at her direction, told members of the press that Pierce used forgery, fraud, and overreaching to gain control of J. Howard, Sr.'s estate. Libel and defamation claims are nondischargeable under § 523(a)(6) when the statements were made with actual knowledge of their falsity. *Wheeler v. Laudani*, 783 F.2d 610, 615 (6th Cir.1986). Thus, at issue, in addition to whether Vickie was responsible for the statements of her attorneys, is whether she knew the statements to be true or false. The bankruptcy court held that proving the truth or falsity of the statements requires proof of some of the same facts as are at issue on Vickie's counterclaim. *Cf. Albright v. Gates*, 362 F.2d 928, 929 (9th Cir.1966) (holding that a counterclaim for recovery of the price paid for oil rights was a compulsory counterclaim to a claim for slander consisting of stating the oil rights were worthless).

However, this nexus between the transactions out of which the claim and counterclaim arise at issue is somewhat attenuated.[22] Pierce had already obtained a judgment

[22] Pierce also argues that even if it arises from the same transaction, Vickie's counterclaim is not compulsory because otherwise-compulsory counterclaims need not be stated if they are the subject of another pending action, and Vickie's counterclaim originally was at issue in the Texas probate proceeding. However, while the party asserting a counterclaim may decline to do so if the counterclaim is the

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against Vickie's attorneys prior to the time when his claim against Vickie was ruled on by the bankruptcy court. The main issue presented by Pierce's claim is Vickie's responsibility for the statements of her attorneys, not the statements' truth or falsity. Thus, the primary facts at issue on Pierce's claim were the relationship between Vickie and her attorneys and her knowledge or approval of their statements. *See generally In re Durso Supermarkets, Inc.*, 170 B.R. 211, 214 (S.D.N.Y.1994) (holding that when a proof of claim is filed based on a state court judgment, the judgment itself is a different factual transaction from the fact underlying it and thus a counterclaim arising out of the same facts as the underlying action was not core, thereby suggesting that the factual transaction test need not be applied reflexively in all circumstances).

Thus, it is not certain that Vickie's counterclaim arises from the same transaction as Pierce's proof of claim. Further, considering both the general rule behind the core classification, which stems from the constitutional concerns of *Marathon*, and also the specific policy that underlies § 157(b)(2)(C), the Court concludes that the counterclaim is not core.

As indicated, absent Pierce's filing of a proof of claim regarding the alleged defamation, the counterclaim clearly would be only a non-core, related matter. In this case, the reasons for why counterclaims arising out of the same

subject of another proceeding, the party is not required to do so. 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1411, at 87 (3d ed. 1998) ("If defendant elects to interpose the pending claim as a counterclaim, however, he should be allowed to do so, and the counterclaim will be treated as if it were compulsory.").

transaction should usually be considered core do not apply. Counterclaims can be core in essence because of judicial economy and what, as a practical matter, makes good sense for the litigants. The purpose of the rule is to prevent a debtor or trustee from having to split a cause of action by defending against a proof of claim in the bankruptcy proceeding but being unable to assert counterclaims there, instead being forced to pursue counterclaims in a different proceeding or forum. *In re Castlerock*, 781 F.2d at 162. Treating Vickie's counterclaim as core is not necessary to advance these policies in this case.

Here, Vickie's counterclaim dwarfs Pierce's defamation in all respects, both in terms of the time and effort spent litigating it and the size of the potential judgment. On Vickie's motion, the bankruptcy court granted summary judgment to Vickie on Pierce's adversary complaint, holding that Vickie was not responsible for any statements made by her attorneys. The counterclaim proceeded to trial and has been pending for over two years since then on its own. The bankruptcy court confirmed Vickie's plan of reorganization on March 8, 1999, over six months before the counterclaim went to trial. While arguably the defamation and tortious interference claims arise out of the same factual transaction, this connection is attenuated. Further, the counterclaim raises issues of law entirely different from those raise[d] on the defamation claim.[23]

[23] Considering in particular that the policy underlying the counterclaim rule is that the debtor should not have to split a cause of action into two forums, the Court notes that Vickie in fact voluntarily pursued similar or substantially similar claims in the Texas probate proceeding until after the bankruptcy court entered its final judgment.

In *In re Kamine/Besicorp Allegany, L.P.*, 214 B.R. 953, 968-71 (Bankr.D.N.J.1997), the court held that counterclaims asserted by the debtor against a creditor that had filed a proof of claim were not core, notwithstanding the fact that they arose from the same transaction as the proof of claim. The debtor owned and operated a power plant. *Id.* at 955. Pre-petition, a dispute arose between it and another entity involved in power production. After the debtor filed for bankruptcy, the other entity filed proofs of claim and then the debtor counterclaimed, asserting in part state common law contract claims. Discussing many of the same arguments advanced by Pierce and Vickie in this case, the court held that the counterclaim did not fall within § 157(b)(2)(C) and was not core because the filing of the proof of claim did not "initiate" or "create" the causes of action asserted in the counterclaim. *Id.* at 969. While procedural distinctions render *In re Kamine/Besicorp* not exactly analogous to the present case, this aspect of it is the same: Vickie's counterclaim was not "created" by Pierce's claim. Her dispute with Pierce runs much deeper and broader than his defamation claim and would exist even in the absence of his defamation claim.

In addition, while it does not give it much weight as the issue was not being directly argued, the Court notes that at a hearing in bankruptcy court on July 24, 1996, counsel for Vickie in fact stated that "we believe the counterclaims are related." Pierce's Appendix at 193:22.

Good arguments exist on both sides of this issue, and the Court acknowledges that reasonable jurists might differ in how they would decide it. Formally, Vickie's counterclaim falls within the language of § 157(b)(2)(C) and, barely, it falls within the "same transaction" rule courts have used when applying § 157(b)(2)(C). However,

neither of those rules are ends in and of themselves. They serve only as means of amplifying and explicating the distinction drawn in *Marathon*. As the Ninth Circuit stated in *In re Castlerock*, "a court should avoid characterizing a proceeding as 'core' if to do so would raise constitutional problems. The apparent broad reading that can be given to § 157(b)(2) should be tempered by the *Marathon* decision." *In re Castlerock*, 781 F.2d at 162; *see also In re Thrall*, 196 B.R. at 968 ("A claim is not core simply because it falls within the wording of § 157(b)(2); the claim must also satisfy the mandate of [*Marathon*]."). When a counterclaim is only somewhat related to the claim against which it is asserted, and when the unique characteristics and context of the counterclaim place it outside of the normal type of set-off or other counterclaims that customarily arise, thus rendering the efficiency concerns not at issue, the counterclaim should not be characterized as core.

IV.
CONCLUSION

The bankruptcy court's assertion of federal subject matter jurisdiction over Vickie's counterclaim for tortious interference is AFFIRMED. However, the bankruptcy court's determination that the counterclaim is a core proceeding is REVERSED. Because the counterclaim is a non-core proceeding, the bankruptcy court's judgment is VACATED.

The Court's decision means only that final judgment in this non-core proceeding must be entered by this Court rather than the bankruptcy court. By this order, the Court rules that the bankruptcy court's judgment is proposed

rather than final, and therefore neither party has prevailed at the present time. Thus, Vickie's claim against Pierce for tortious interference has not yet been resolved by any court.[24] This Court will now engage in a comprehensive, complete, and independent review of the bankruptcy court's record and may, if warranted, hear additional testimony from the parties and witnesses. This review will enable this Court to decide whether J. Howard, Sr. promised a gift to Vickie, whether Pierce interfered with that gift, and also whether Pierce has destroyed and failed to produce relevant evidence in a way that justifies the imposition of sanctions.

As a consequence of this ruling, the current arrangements regarding security for a stay on execution of the judgment pending appeal are VACATED.

The Court sets a status conference in this matter for June 4, 2001 at 8:30 a.m. in Santa Ana. Prior to this conference, attorneys for the parties should meet and confer, in person, regarding the effect of this ruling on all matters pending between these and related parties. They shall file a joint status report regarding such issues no later than May 31, 2001 at 4:00 p.m.

Because this order involves two "controlling question[s] of law as to which there is substantial ground for difference of opinion and . . . an immediate appeal from the order may materially advance the ultimate termination of the litigation," 28 U.S.C. § 1292(b), the Court hereby CERTIFIES this order for interlocutory appeal as to both the issue of the probate exception and the issue of

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[24] Vickie's claim against Pierce individually was not addressed or determined by the Texas probate court.

whether Vickie's counterclaim is a core or non-core proceeding. Any appeal from this order shall not stay proceedings before this Court unless the Court of Appeals so orders.[25]

IT IS SO ORDERED.

[25] The Court originally issued this order on May 24, 2001, without including any statement as to certification under 28 U.S.C. § 1292(b). Because a § 1292(b) certification must be in the order certified for appeal itself, the Court now issues this order in amended form including the requisite statement. *See* 28 U.S.C. § 1292(b) and Fed. R.App. P. 5(a)(3).

257 B.R. 35

United States Bankruptcy Court,
C.D. California.
In re Vicki Lynn MARSHALL, Debtor.
E. Pierce Marshall, Plaintiff,
v.
Vicki Lynn Marshall, Defendant.
Vicki Lynn Marshall, Counterclaimant,
v.
E. Pierce Marshall, Counterdefendant.
Bankruptcy No. LA 96-12510-SB.
Adversary No. 96-01838-SB.

Dec. 29, 2000.

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ORDER ON MOTION FOR ENTRY OF JUDGMENT

SAMUEL L. BUFFORD, Bankruptcy Judge.

Trial in this adversary proceeding took place in October and November, 1999. It has come time to resolve the remaining issues in this adversary proceeding, and to issue a judgment. This opinion addresses three issues: (1) whether the alleged probate exception to federal jurisdiction applies to this adversary proceeding; (2) whether this

is a "core proceeding" within the meaning of 28 U.S.C. § 157(b); and (3) what form the judgment in this adversary proceeding should take.

A. Jurisdiction

E. Pierce Marshall continues to complain that this court lacks jurisdiction over this adversary proceeding because this claim belongs in the probate case now in trial in Texas. Notably, however, he has never brought a motion on this subject on proper notice pursuant to this court's motion rules. For this reason alone this issue has never been properly brought before this court, and E. Pierce Marshall is entitled to no relief on this subject.

In addition, by filing his claim in this bankruptcy case and by filing this adversary proceeding against Vicki Marshall, E. Pierce Marshall voluntarily submitted to the jurisdiction of this bankruptcy court.

He cannot now complain of the consequences thereof, especially after the court has ruled on the merits of his dispute with Vicki Marshall.

1. Supreme Court Case Law

The extent of the equity jurisdiction of the bankruptcy court in this case is governed by United States Supreme Court precedent. The Supreme Court has stated, "by filing a claim against a bankruptcy estate the creditor triggers the process of allowance and disallowance of claims, thereby subjecting himself to the bankruptcy court's equitable power." *Langenkamp v. Culp,* 498 U.S. 42, 44, 111 S.Ct. 330, 331, 112 L.Ed.2d 343 (1990) (internal quotes omitted).

This equity jurisdiction of the bankruptcy court includes both claims *by* the creditor against the estate and claims *against* the creditor by the estate's representative. In *Langenkamp,* for example, the Supreme Court found that a preference action filed against a creditor who had filed a claim was "a part of the claims-allowance process," and that the filing of the claim waived the right to a jury trial in the preferential transfer adversary proceeding. *Id.* "In other words," the Supreme Court said, "the creditor's claim and the ensuing preference action by the trustee become integral to the restructuring of the debtor-creditor relationship through the bankruptcy court's equity jurisdiction." *Id.*

By contrast, in an earlier case the Supreme Court found that a fraudulent transfer adversary proceeding did not come within the "process of allowance and disallowance of claims." *Granfinanciera, S.A. v. Nordberg,* 492 U.S. 33, 57-59, 109 S.Ct. 2782, 2799, 106 L.Ed.2d 26 (1989) (holding that defendants had a right to a jury trial). The Supreme Court reached this result, however, only because the defendants had *not* filed claims in the bankruptcy case. *See Langenkamp,* 498 U.S. at 44-45, 111 S.Ct. at 331. Indeed, the purpose of *Langenkamp* was to eliminate any speculation that the right to a jury trial might survive the filing of a claim in the bankruptcy case, and to make clear that the equity jurisdiction of the bankruptcy court extended to all claims between a creditor and the estate, once the creditor files a claim.

Similarly, in *Hong Kong & Shanghai Banking Corp. v. Simon (In re Simon),* 153 F.3d 991 (9th Cir.1998), the Ninth Circuit found that, by filing a claim, the bank "forfeited any right it had to claim that the court lacked the power to

enjoin [it] from commencing a post-bankruptcy collection proceeding against the debtor" in Hong Kong. *Id.* at 997.

The teaching of *Langenkamp, Granfinanciera* and *Simon* is that the filing of a claim in a bankruptcy case has substantial procedural consequences for the claimant. By filing a claim, a claimant voluntarily submits to the equity jurisdiction of the bankruptcy court for the allowance and disallowance of all claims made *by* the claimant against the bankruptcy estate or made *against* the claimant by the bankruptcy estate's representative.

E. Pierce Marshall filed his claim against the bankruptcy estate in this case. He thus voluntarily submitted himself to the bankruptcy court's equity jurisdiction as to all claims by the estate against him, including the claims asserted in this adversary proceeding.

2. The "Probate Exception" to Federal Jurisdiction

E. Pierce Marshall also argues that this court has no jurisdiction over debtor's counterclaim because it essentially involves a probate matter pending in a Texas court that is subject to a probate exception to federal jurisdiction.

While there is a probate exception to federal jurisdiction, it is applicable principally to diversity jurisdiction under 28 U.S.C. § 1332 (2000). *See, e.g., Georges v. Glick,* 856 F.2d 971 (7th Cir.1988) (holding that probate exception applies only in diversity cases); *Goerg v. Parungao (In re Goerg),* 844 F.2d 1562 (11th Cir.1988) (same).[1] As the

[1] Notably, E. Pierce Marshall fails to cite either of these cases.

court in *Goerg* specifically stated, "[t]hat exception relates only to 28 U.S.C. § 1332 (1982), and has no bearing on federal question jurisdiction, the jurisdiction invoked in bankruptcy cases." *Id.* at 1565 (footnote omitted). The court in *Goerg* further warned: "[c]are should be taken not to confuse the question of the breadth of Congress' bankruptcy power with the so-called "probate exception" to statutory diversity jurisdiction." *Id.* Furthermore, the probate exception to diversity jurisdiction must be narrowly construed. *Georges,* 856 F.2d at 973. The court in *Goerg* declared generally: "[o]wing to the supremacy clause, federal bankruptcy law preempts state law; as one of Congress' enumerated powers, the power to enact bankruptcy laws is limited only by the substantive guarantees contained in the Constitution." *Goerg,* 844 F.2d at 1565.

Virtually all of the cases that E. Pierce Marshall cites in support of his argument are diversity cases, and thus are inapplicable in this case. As in the *Goerg* case, this court's jurisdiction over this adversary proceeding rests on the federal question jurisdiction applicable in bankruptcy cases.

Goerg and *Georges* may overstate the lack of a probate exception to federal jurisdiction. In *Markham v. Allen,* 326 U.S. 490, 66 S.Ct. 296, 90 L.Ed. 256 (1946)[2], the Supreme

[2] E. Pierce Marshall also relies on two quite old United States Supreme Court decisions, which the court finds inapposite. In *Sutton v. English,* 246 U.S. 199, 38 S.Ct. 254, 62 L.Ed. 664 (1918), a suit to annul a will, the Supreme Court found no federal question and no diversity of citizenship, and thus no colorable basis for federal jurisdiction. *Id.* at 200, 208, 38 S.Ct. 254. In *O'Callaghan v. O'Brien,* 199 U.S. 89, 25 S.Ct. 727, 50 L.Ed. 101 (1905), the Supreme Court found that the only

(Continued on following page)

Court held that a federal court may properly exercise jurisdiction over a case brought against the executor and resident heirs of a decedent's estate that was in the course of probate administration in state court. Federal jurisdiction arose under the Trading With the Enemy Act, where the plaintiff was a federal officer authorized to receive inheritances in place of German heirs during World War II.

The Supreme Court in *Markham* found that the probate limitation on federal jurisdiction only prohibits a federal court from probating a will, administering a decedent's estate, or assuming control of property in the custody of the state court. *See id.* at 494, 66 S.Ct. 296. The Supreme Court found that a federal court may properly adjudicate rights in probate property, so long as its final judgment does not undertake to interfere with the state court's possession of the property. *Id.* The Supreme Court held that the lower court's ruling that the plaintiff was entitled to all of the net probate estate after payment of debts, taxes and expenses of administration was a proper exercise of federal jurisdiction. *Id.* at 495, 66 S.Ct. 296.

The *Markham* rationale would permit this court to determine (if appropriate on the merits) that Vicki Marshall is entitled to all (or a portion) of the net assets in the possession of the Texas probate court (except as to any parties over whom this court has not had jurisdiction). However, this court's rulings do not affect the disposition of the Texas probate assets.

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asserted ground for federal jurisdiction was frivolous. *Id.* at 100-01, 25 S.Ct. 727.

E. Pierce Marshall relies particularly on *Beren v. Ropfogel,* 24 F.3d 1226 (10th Cir.1994), which involved a claim for an expectation of inter vivos gifts or testamentary dispositions. This case, which also appears to be a diversity case, provides no assistance to E. Pierce Marshall. The court sustained the dismissal of claim for an expectation of a gift or testamentary devise on the grounds of failure to state a claim for relief, not on jurisdictional grounds. *See id.* at 1229-30.

Furthermore, the "probate exception" issue has never been properly brought before this court. This issue was first raised by Pierce Marshall in a motion *in limine* that was filed on October 18, 1999, and set for hearing on the first day of trial on October 28, 1999. This procedure violated the court's motion rule, Local Rule 9013-1, which requires 21 days notice of a motion (24 days if served by mail). The court finds that this issue was raised at that time principally for the purpose of delaying the trial.

Pierce Marshall waived his right to make this argument by waiting until several rounds of sanctions had been imposed on him before raising it. Ninth Circuit law holds that a party cannot wait until trial, after the case is going badly for that party, to raise a jurisdictional issue. *See Hill v. Blind Industries & Services,* 179 F.3d 754 (9th Cir.1999).

The court finds that the "probate exception" argument was waived because it was not raised in a timely fashion. A renewal of this argument now, a year after trial, at the time for entry of judgment, is likewise not timely.

3. Abstention

On January 6, 1997 E. Pierce Marshall filed his motion contending that mandatory or discretionary abstention applied to Vicki Marshall's counterclaim. As to mandatory abstention, E. Pierce Marshall argued that this portion of the dispute should be heard in a court in Louisiana rather than this court, because J. Howard Marshall II's probate case was pending there. In fact, shortly thereafter the Louisiana Supreme Court dismissed the probate action for lack of jurisdiction. Probate proceedings were subsequently filed in Harris County Court in Houston Texas, and remain pending.

E. Pierce Marshall's motion for abstention was untimely. It was not even filed until eight months after this adversary proceeding was filed, at which time this adversary proceeding was well under way.

This court's denial of mandatory abstention has been vindicated both by the lack of Louisiana jurisdiction all together, and by the fact that the trial in the Texas probate action did not begin until nearly four years after this court denied E. Pierce Marshall's motion for abstention, and nearly a year after this court's own trial in this adversary proceeding, and still remains pending.

This court ruled on the abstention motion in 1997, and this ruling is now only subject to review on appeal.

B. Counterclaim as a Core Proceeding

On July 8, 1996 E. Pierce Marshall moved for dismissal of the counterclaim on the grounds of lack of jurisdiction. In opposition to the motion to dismiss, Vicki Marshall asserted that the counterclaim fell within this

court's core jurisdiction under 28 U.S.C. § 157(b)(2)(C), on the grounds that the counterclaim in the adversary proceeding was in substance a counterclaim against E. Pierce Marshall's claim against the estate.

At the hearing on August 14, 1996 the court found that the counterclaim in the adversary proceeding was in substance also a counterclaim to Pierce Marshall's claim filed in this case, pursuant to which he voluntarily submitted to the jurisdiction of this court. The court found that the only substantial difference between E. Pierce Marshall's claim that he filed in the bankruptcy case and the complaint that he filed in the adversary proceeding was that in the adversary proceeding he sought a determination that the debt asserted in the claim was nondischargeable. The court further found that the counterclaim arose out of the same transactions and occurrences as the claim and the adversary complaint. Because of the close relation between E. Pierce Marshall's claim and his adversary complaint, the court consolidated the proceedings for all purposes, including trial and judgment.

E. Pierce Marshall raised a question at oral argument whether *Piombo Corp. v. Castlerock Properties (In re Castlerock Properties)*, 781 F.2d 159 (9th Cir.1986), would require a finding that the counterclaim is not a core proceeding. *Castlerock* is clearly a different case from this. In *Castlerock* the Ninth Circuit found that adversary proceeding at issue was not a core proceeding, because it was filed before the creditor filed its claim in the bankruptcy case. *Id.* at 161-62. Here, to the contrary, the counterclaim was filed in the adversary proceeding voluntarily filed by E. Pierce Marshall in this court, after he had also voluntarily filed his claim in this case. His voluntary

submission to the jurisdiction of this court could not be more clear.

Furthermore, the court's August 14, 1996 determination that the counterclaim and the adversary proceeding was also essentially a counterclaim to Pierce Marshall's claim is not now open to further consideration in this court, unless an appellate court should require such further consideration.

Because this is a core proceeding, the court has power to enter judgment. As to related proceedings only, the court prepares findings of fact and conclusions of law and recommend a judgment, which is submitted to the district court for *de novo* review. *See* 28 U.S.C. § 157(c)(1). However, for a core proceeding the bankruptcy court enters its own judgment.

C. Entry of Judgment

Vicki Marshall has moved this court for entry of judgment on her counterclaim now, rather than delay until the completion of the probate trial in Texas. E. Pierce Marshall opposes the entry of judgment at the present time. The court finds the arguments of Vicki Marshall well taken, and the arguments of E. Pierce Marshall unpersuasive.

In the Court's order of October 6, 2000 the court determined that entry of judgment should await the resolution of the probate action in Texas, on the grounds that a calculation of Vicki Marshall's damages cannot be made until the probate court determines what inheritance Vicki Marshall is entitled to receive from her deceased husband J. Howard Marshall II. The court determined

that Vicki Marshall's damages (excluding punitive damages, subsequently awarded in the amount of $25 million) amounted to $449,754,134, less whatever she recovers in the probate action. Upon further consideration, and evaluation of the arguments of the parties, the court is persuaded that judgment can be awarded at the present time in a form to take account of any recovery by Vicki Marshall in the Texas probate action. Such a recovery is accommodated as follows: any amount that Vicki Marshall recovers in the probate action will count as partial (or full) satisfaction of the judgment issued herein.

The court finds a further reason for issuing judgment in this adversary proceeding sooner rather than later. E. Pierce Marshall appears to be planning to take an appeal in this dispute, and has made a motion for leave to file an interlocutory appeal. The sooner this court issues its judgment, the sooner a definitive appellate process can begin.

D. Injunctive Relief

In addition to a money judgment, the debtor requests injunctive relief as a part of this court's judgment. A claim for such relief is contained in the counterclaim. No preliminary injunctive relief was sought in this adversary proceeding. Thus the issue is limited to the issuance of a permanent injunction as part of this court's judgment.

Injunctive relief is not normally available as part of a money judgment. Rule 69 of the Federal Rules of Civil Procedure, incorporated by reference in Rule 7069 of the Federal Rules of Bankruptcy Procedure, incorporates by reference the state law for enforcement of judgments. Vicki Marshall has not shown that injunctive relief is also available as part of a judgment.

The United States Supreme Court touched on this issue in *Grupo Mexicano v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 119 S.Ct. 1961, 144 L.Ed.2d 319 (1999), where it found that a federal court may not issue a preliminary injunction to restrain lawful conduct to protect an anticipated judgment of the court. The Supreme Court observed that the equitable action known as a "creditors bill" is traditionally available to permit a judgment creditor to discover the debtor's assets, to reach equitable interest not subject to execution at law, and to set aside fraudulent conveyances. *See id.* at 319, 119 S.Ct. 1961. The Court noted that, as a general rule, a creditors bill could be brought only by a creditor who had already obtained a judgment establishing the debt. *Id.* The Court further noted that the law of fraudulent conveyances in bankruptcy was developed to prevent the hiding of assets by a defendant while litigation was in process. The Court also noted that state statutes eliminating the need for a judgment before bringing a fraudulent conveyance claim may have altered the common law rule and may permit the tying up of a defendant's assets while litigation is pending. *See id.*, at 324 n. 7, 119 S.Ct. 1961.

This court finds that the debtor has not shown her entitlement to injunctive relief in support of her money judgment. Accordingly, injunctive relief is denied at this point. However, the denial of injunctive relief is without prejudice to bringing in appropriate judgment enforcement procedures.

By separate document the court is issuing a judgment consistent with its rulings herein and in its prior orders.

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253 B.R. 550

United States Bankruptcy Court, C.D. California.
In re Vickie Lynn MARSHALL, Debtor.
E. Pierce Marshall, Plaintiff,
v.
Vickie Lynn Marshall, Defendant.
Vickie Lynn Marshall, Counterclaimant,
v.
E. Pierce Marshall, Counterdefendant.
Nos. LA 96-12510-SB, LA 96-01838-SB.

Oct. 6, 2000.

AMENDED MEMORANDUM OF DECISION FOLLOWING TRIAL

SAMUEL L. BUFFORD, Bankruptcy Judge.

I. Introduction

Debtor Vicki Lynn Marshall, also known as Anna Nicole Smith, is the surviving widow of J. Howard Marshall II, who was said to be the richest man in Texas.[1] Nonetheless, E. Pierce Marshall, J. Howard's[2] second son from a prior marriage, contends in the probate case now in trial in Probate Court in Houston, Texas that J. Howard died essentially penniless. In this adversary proceeding the court finds that Pierce tortiously interfered with

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[1] Testimony in a prior trial in an adversary proceeding in this bankruptcy case indicates that there may have been one Texan more wealthy than J. Howard at the time of his death.

[2] Because all of the principals in this case have the same last name, the court will refer to them by their first or second names, according to how they are commonly known.

Vickie's expectancy of an *inter vivos* gift that J. Howard instructed his attorneys to arrange.

The court finds that Vickie has suffered damages in the amount of $449,754,134, less whatever she receives from the probate of J. Howard's estate. These damages are mainly based on sanctions imposed on Pierce for his egregious discovery abuse in this adversary proceeding. A final calculation of the damages remains to be determined upon the completion of the probate case.

II. Findings of Fact

This adversary proceeding came on for trial on October 27, 1999 and proceeded for five days over a period of a week and a half. The court has heard the testimony of the witnesses who testified at trial, considered the testimony of those that appeared through deposition transcript, and evaluated the credibility of all of the witnesses. Insofar as the testimony of any witness conflicts with the findings herein (including findings imposed as discovery sanctions), the court finds that such testimony is not credible.

Vickie filed this bankruptcy case on January 25, 1996, a few months after the decease of her husband J. Howard. His estate remains tied up in a probate proceeding in Texas, where a trial is now in process. It appears that Vickie filed this bankruptcy case for two reasons: she had just suffered an $884,607.98 default judgment to her housekeeper Maria Cerrato on sexual misconduct claims,[3] and she had not received any inheritance from J. Howard.

[3] The sexual harassment case was subsequently settled.

Under her professional name of Anna Nicole Smith, Vickie has pursued an acting and modeling career. She appeared on the cover photo of Playboy Magazine in March, 1992, as the centerfold Playmate of the month in the May, 1992 issue, and as the Playmate of the Year for 1992. She is also known for her television appearances as a model for Guess Jeans. J. Howard promoted and encouraged this career before and during their marriage and paid for acting lessons for her.

After a courtship that lasted some two and a half years, Vickie agreed to marry J. Howard in June, 1994, and they were married immediately. At that time J. Howard was 89 years old, and Vickie was 26. This was the third marriage for J. Howard, and the second for Vickie. J. Howard had two sons from his first marriage, J. Howard Marshall III and Pierce. Vickie had a son from her prior marriage. While a prenuptial agreement was drafted, it was never signed by the parties.

J. Howard's wealth consisted principally in his ownership of approximately 16% of the outstanding shares of stock in Koch Industries, Inc. [hereinafter KII], the second largest privately held corporation in the United States. The Marshall interest in the KII stock was held by Marshall Petroleum, Inc. [hereinafter MPI]. J. Howard's interest in MPI was 70.51776%. The 16% interest in KII is particularly valuable because it was the controlling interest in deciding a family dispute in the early 1980's between two factions of the Koch family.[4] Most of the

[4] After the dust settled in 1981, Charles Kock and David Kock each held 40-41% of the KII stock, J. Howard held 16%, and the remainder was held by employees pursuant to an employee stock option plan.

income of KII has been reinvested in the business: typically less than ten percent has been distributed to shareholders.

As an inducement to marry him, J. Howard promised Vickie that he would leave her half of what he had. J. Howard made this promise repeatedly, both before and after the marriage.

In December, 1992 J. Howard instructed Harvey Sorensen, an attorney who represented him from time to time, to arrange a gift to Vickie, "his future wife," of a half interest in his "new community." This gift was to be structured so that the value of the gift was to be measured by J. Howard's interest in the increase in value of the underlying KII stock held by MPI. A few days earlier J. Howard also instructed Jeff Townsend, another attorney who did work for J. Howard, to arrange for Edwin Hunter, a third attorney, to prepare a "catch-all trust" for Vickie's benefit. Neither of these projects was completed **because Pierce fired Sorensen and conspired with Hunter to prevent the drafting and execution of the documents that would have accomplished the gift that J. Howard had directed.**[5]

At the time of trial,[6] J. Howard's interest in the KII stock was worth $1,640,978,961.[7] From the time that J.

[5] The text in bold print consists in findings that the court makes as sanctions for the discovery violations that are discussed *infra*.

[6] The actual valuation date for the KII stock for the purposes of trial was August 31, 1999.

[7] The court assumes that the KII stock is now worth more than $2 billion because the price of oil has increased more than 50% in the last year.

Howard and Vickie were married to the date of trial, the value of the stock increased by $449,754,134.

In 1982 J. Howard set up a Living Trust to hold his assets,[8] and eventually transferred the MPI stock into the Trust. J. Howard was the trustee. At the time of Vickie's marriage to J. Howard, Pierce and his family were the sole beneficiaries of the trust: neither Vickie nor J. Howard Marshall III had any beneficial interest in its assets. However, J. Howard had the power to revoke the Trust at any time, in which event the trust assets would revert to J. Howard.

For many years Pierce was fearful that his father J. Howard would give away a substantial part of the wealth that Pierce wanted to inherit. Pierce often argued with J. Howard about money and about J. Howard's gifts to Vickie. Pierce also resented the gifts that J. Howard gave to Lady Walker, his mistress who had died shortly before J. Howard met Vickie, and Pierce brought aggressive litigation against Lady Walker's heirs to challenge their right to what he considered Marshall property. J. Howard did not care about Pierce's views on these subjects.

As soon as Pierce learned of his father's marriage to Vickie, he contacted attorney Edwin Hunter, to take action to assure that Vickie did not receive any of the assets in the Living Trust. Pierce was concerned because his father had been especially generous to Lady Walker, his father's mistress for many years who had died in 1990, and he feared that his

[8] Exhibit A to the trust instrument is supposed to be a list of assets transferred into the trust. This exhibit has apparently never been produced in this adversary proceeding.

father would be equally generous to Vickie. In response, Hunter devised a plan to make the trust irrevocable, so that the assets would be protected for Pierce and his family.

The next week Pierce and Hunter met with J. Howard to review a document entitled, "J. Howard Marshall, II Post Nuptial Fine Tuning of Estate Plan" [hereinafter the Fine Tuning Document]. This document contained proposed amendments to the Living Trust.

J. Howard relied on Pierce and Hunter to inform him of the contents of the document. By that time J. Howard's eyesight had deteriorated to the point where he was not able to read any text finer than a newspaper headline.[9] Apparently, J. Howard signed[10] the Fine Tuning Document.[11]

However, the change that made the Living Trust irrevocable was not in the Fine Tuning Document at the time that J. Howard apparently signed it.[12] **Pierce caused this**

[9] However, J. Howard's mental capacities remained intact until his death.

[10] The records of Eyvonne Scurlock, the notary who allegedly notarized J. Howard's signature on the Fine Tuning Document, are in shambles and have no credibility. Among other defects, items are out of sequence, key pages are torn out, blank pages are interspersed between those containing notarial records, and she notarized signatures that she did not witness. Indeed, for the first ten years she served as a notary she kept no notarial records at all and did not know that they were required.

[11] The court is informed that the authenticity of J. Howard's signature on the trust amendment is at issue in the Texas Probate Court. This issue is left for decision by that court.

[12] In addition to what the court finds based on the evidence, the findings in this sentence are also adopted as sanctions for Pierce's discovery violations, as discussed *infra*.

change to be added to page two of the Document at a later date, likely after J. Howard's death.[13]

After his father's death, Pierce has continued his plot to prevent Vickie from obtaining any Marshall family assets. Pierce contends that essentially all of J. Howard's assets were in the Living Trust at the time of his death. Pierce stated that, if Vickie tried to get any of the assets, "it would be World War III." Indeed, the court finds that Pierce has adopted a scorched earth approach to the conduct of this litigation and has done his best to make it look like World War III.

III. Pierce's Discovery Abuses

The court previously found that Pierce engaged in massive discovery abuse in this adversary proceeding in connection with the production of documents properly requested under Rule 7034, which incorporates by reference Rule 34 of the Federal Rules of Civil Procedure.

Pierce's discovery infractions include four kinds of egregious discovery abuse. First, he failed to serve a written response within 30 days after the service of the request, as required by Rule 34(b) and incorporated by

[13] After trial, Vickie moved to reopen the record to submit the testimony of Donald J. Fandry, an expert who examined the Fine Tuning Document. The second page of the Document, which contains the provision making the trust irrevocable, is very different from the remaining pages of the document in the following respects: (1) this page alone lacks a watermark; (2) this page is missing a number of the staple holes that appear in the pages before and after, which result from a number of restaplings of the original document; and (3) this page was printed with a different printer from the rest of the document. This page, in its present form, was not part of the original document.

reference in Fed.R.Bankr.P. 7034.[14] Second, more than a year after the document production request (and after monetary sanctions had been imposed more than once), Pierce provided a privilege log which listed thousands of documents that were not produced based on claims of attorney-client privilege or work product. This privilege log was grossly insufficient for supporting his claim that the documents were not subject to discovery. Third, Pierce disobeyed altogether the court's order to submit these documents for examination in chambers to determine whether the documents qualified for discovery exemption. Fourth, Pierce destroyed a substantial quantity of documents that were subject to a pending discovery request. These egregious discovery abuses require that the court impose appropriate sanctions.[15]

A. Sending Documents to Attorney

Pierce testified that, upon J. Howard's death, he boxed up all of J. Howard's papers and sent them to Edwin Hunter in Lake Charles, Louisiana. These papers fall into two categories: papers belonging to MPI and personal papers that belonged to J. Howard at the time of his death. For both categories, Pierce's obligation to produce the documents is the same as if they were still in his personal possession. As to the documents belonging to MPI, Pierce was the president and sole director of MPI at all material times during this litigation and had the power and responsibility to produce the documents.

[14] Pierce also did not serve such a response at any reasonable time thereafter.

[15] These discovery abuses are not the only ones committed by Pierce, but only the most egregious.

As to the personal papers of J. Howard, Pierce was the administrator of J. Howard's probate estate in Louisiana when this adversary proceeding began,[16] when the document production requests were promulgated, when responses thereto came due, and when the documents should have been produced. The Louisiana probate case was ultimately dismissed for lack of jurisdiction and a new probate case was filed in Texas, where a different administrator was appointed. However, Pierce's default occurred during his watch, and his failure to produce the documents cannot be excused by his subsequent replacement by another administrator. Furthermore, the court is informed that Pierce's successor eventually waived any privilege that he had in the documents. Nonetheless, the documents were never produced in this adversary proceeding.

It is hornbook law that delivering pre-existing documents to a lawyer does not change a party's obligation to produce them in litigation. McCormick states:

> [T]his principle is controlling: If a document would be subject to an order for production if it were in the hands of the client it will be equally subject to such an order if it is in the hands of his attorney.

MCCORMICK ON EVIDENCE 330 (John William Strong, ed., 4th ed.1992); *accord, United States v. Robinson,* 121 F.3d 971, 975 (5th Cir.1997) ("it goes without saying that documents do not become cloaked with the lawyer-client privilege merely by the fact of their being passed from

[16] This adversary proceeding began as a claim that Pierce filed in this bankruptcy case for defamation, and Vickie's counterclaim that is the subject of this decision. Summary judgment was previously awarded to Vickie on the defamation claim, because Pierce offered no evidence to support the claim.

client to lawyer"); *Smith v. Texaco, Inc.,* 186 F.R.D. 354, 356-57 (E.D.Tex.1999). McCormick further states that any other rule "would be an intolerable obstruction to justice." MCCORMICK, *supra,* at 329.

Pierce had full responsibility for the production of all documents in either of these two categories that he sent to Hunter. When Vickie made demand for the production of the documents, Pierce's responsibility was to instruct Hunter to produce the documents for inspection or copying, or to raise any claimed defense to their discovery in a timely filed response. Hunter did neither.[17]

B. Claiming a Privilege

A party claiming a privilege has the burden of showing that the privilege applies. *United States v. Bauer,* 132 F.3d 504, 507 (9th Cir.1997). Federal common law governs the application of a privilege in an adjudication based on federal law. *See* Fed.R.Evid. 501. Where state law provides the applicable substantive law, privilege issues are governed by that state's law. *Id.* In this case, the causes of action at issue are governed by Texas law. Thus Texas law governs the issues of attorney-client privilege and work product.

The legal standard for the attorney-client privilege is as follows:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by his legal advisor, (8) except the protection be waived.

[17] If, after receiving such instructions, Hunter failed or refused to produce the documents, Pierce's remedy is against Hunter for violation of Hunter's duty as Pierce's agent to obey his lawful orders.

See 8 J. WIGMORE, EVIDENCE § 2292 at 554 (J. McNaughton rev.1961); *see also United States v. El Paso Co.,* 682 F.2d 530, 538 (5th Cir.1982); *Smith v. Texaco, Inc.,* 186 F.R.D 354, 356 (E.D.Tex.1999).

For each document transmitted to a non-attorney, Pierce must show, as to each such recipient, (a) the recipient's name, (b) the position that the recipient held at the time, (c) if the recipient received the document as a corporate official or employee, how the corporation's privilege applied to the recipient. *See Upjohn Co. v. United States,* 449 U.S. 383, 391-96, 101 S.Ct. 677, 683-86, 66 L.Ed.2d 584 (1981).

Pierce has not made an adequate showing on any of these issues, as to any of the documents at issue. While the names of some of the authors and recipients are given, none is identified as an attorney. The positions of the non-attorneys at the relevant times are not given, nor is any explanation given of how they qualify under *Upjohn.*

The court has serious reservations about the legitimacy of the attorney-client privilege and work product claims. Pierce did deliver more than 100 documents for *in camera* inspection that were in the possession of Jeff Townsend. The court found that approximately 13 of the documents were subject to a legitimate claim of attorney-client privilege or work product. For most of the remaining documents, the court found no good faith contention that either exception applied. The non-qualifying documents

included such items as transmittal letters, annual statements of KII, a videotape of J. Howard's arrival at Vickie's home to visit her after their marriage, and photographs of Vickie taken on vacation after J. Howard's death. The court infers from this evidence that most of the attorney-client privilege and work product claims for the Hunter documents are equally meritless.[18]

Because Pierce failed to carry the burden of showing the applicability of either the attorney-client privilege or the attorney work product doctrine, all of the documents on the privilege log should have been produced to Vickie in this litigation. They were not. The court concludes and finds that all of the privilege and work product claims relating to the Hunter documents were also specious and made in bad faith.

[18] If Ninth Circuit law had governed the procedures relating to the testing of the assertion of attorney-client privilege and work product, that law would require the party opposing the privilege claim to show a factual basis sufficient to support a reasonable, good faith belief that *in camera* inspection may reveal evidence that information in the materials is not privileged. *See In re Grand Jury Investigation,* 974 F.2d 1068, 1074-75 (9th Cir.1992); *see also United States v. Zolin,* 491 U.S. 554, 572, 109 S.Ct. 2619, 2631, 105 L.Ed.2d 469 (1989) (for determination of crime-fraud exception to attorney-client privilege, once threshold showing is made, court has discretion to conduct *in camera* review based on all the facts and circumstances of the case, including the relative importance to the case of the alleged privileged information, the likelihood that the evidence produced through *in camera* review (together with the other evidence in the case) will establish that the exception applies). The experience with the Townsend documents fully satisfies these requirements.

C. Sanctions for Discovery Violations

The court issued its findings and sanctions order on the discovery violations on May 20, 1999.[19] The court subsequently vacated that order. Meanwhile, Pierce has done nothing to vitiate his refusal to produce the documents at issue for an *in camera* inspection.

The findings of fact and conclusions of law highlighted in bold in this opinion or otherwise specified are imposed as sanctions for Pierce's discovery abuse. The court finds that many documents listed in the privilege log directly relate to the transactions as to which the sanctions are imposed. Furthermore, there is no way to know what was in the documents that Pierce destroyed while they were subject to a discovery request.

In addition, Edwin Hunter testified at the trial over Vickie's objections based on Hunter's failure to produce the Hunter documents or to submit them to the court for *in camera* inspection. The court now sustains those objections, and strikes Hunter's testimony.

IV. Tortious Interference with Expectancy of Inheritance or Gift

Texas law clearly recognizes tortious interference with an inheritance or gift as a valid cause of action. The leading Texas case is *King v. Acker,* 725 S.W.2d 750, 754 (Tex.App.1987); *see also Brandes v. Rice Trust, Inc.,* 966 S.W.2d 144, 146-47 (Tex.App.1998). In *King* the court

[19] The court issued a prior set of findings and sanctions on January 21, 1999, which were vacated by the district court and remanded for more specific findings.

sustained a claim for tortious interference with an expected inheritance in an action brought against the decedent's second wife by the decedent's two children from his first marriage. The court found that the second wife improperly attempted to assign 500 shares of stock to herself from the decedent while he was in a coma, pursuant to a power of attorney that the jury found the decedent had not signed.

King was the first published opinion declaring that Texas law recognizes a cause of action for tortious interference with inheritance rights. Following courts from other states, the court relied on the Restatement formulation of the rule, which states:

> One who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to the other for loss of the inheritance or gift.

Restatement (Second) of Torts § 774B (1977). The court further supported its conclusion by stating:

> It is well understood that the law affords a remedy for every invasion of a legal right. Under the maxim "where there is a right, there is a remedy," equity will not suffer a right to be without a remedy.

King, 725 S.W.2d at 754. On these grounds the court upheld an award of both compensatory and punitive damages against the decedent's second wife for using the forged power of attorney to transfer stock from the decedent to herself while he was unconscious.

In *Brandes* the decedent's sister and her children brought an action against Rice University for tortiously

interfering with their expectancy to inherit some $4 million in municipal bonds that the decedent transferred to the university on his deathbed. The court ruled for the university because the decedent's will would not have left the bonds to the plaintiffs if the transfer to the university had not been made. *Brandes,* 966 S.W.2d at 149.

Texas case law does not specify the elements of a cause of action for tortious interference with an expectancy of inheritance or gift. Other jurisdictions, however, have generally held that a plaintiff must prove the following five elements: (1) the existence of an expectancy; (2) a reasonable certainty that the expectancy would have been realized, but for the interference; (3) intentional interference with that expectancy; (4) tortious conduct involved with the interference; and (5) damages. *See, e.g., Doughty v. Morris,* 117 N.M. 284, 871 P.2d 380, 384 (Ct.App.1994); *see also* James A. Fassold, *Tortious Interference with Expectancy of Inheritance: New Tort, New Traps,* ARIZ. ATT'Y, 26, 27 (Jan.2000); Dennis D. Reaves, *Tortious Interference with an Expected Gift or Inheritance,* J.MO.B. 563, 564 (1991).

A. Existence of an Expectancy

The court finds that Vickie had an expectancy to receive a substantial portion of J. Howard's wealth. J. Howard repeatedly told her that she would receive half of what he owned. While J. Howard never made a will with any provision for her, this was because his principal assets were already in the Living Trust. J. Howard's plan was to provide for Vickie from the Living Trust.

In December, 1992 J. Howard instructed both Sorensen and Hunter to arrange a gift to Vickie from the Trust.

J. Howard instructed Hunter, a tax and estate planning expert, to prepare a "catch-all trust" for Vickie. A few days later J. Howard instructed Sorensen to prepare the documents for a gift to Vickie of one-half of the future appreciation in J. Howard's interest in the MPI stock. No evidence has been offered that these instructions were ever rescinded.

B. Reasonable Certainty of Expectancy But For Defendant's Conduct

Vickie must show with a reasonable degree of certainty that she would have received the expectancy but for Pierce's interference. Comment d to § 774B states in relevant part:

> [T]here must be proof amounting to a reasonable degree of certainty that the bequest or devise would have been in effect at the time of the death of the testator or that the gift would have been made inter vivos if there had been no such interference. . . . Complete certainty is [often] impossible. It is not required. . . . The fact that it was the defendant's tortious act that makes it not possible to prove with certainty may be taken into consideration by the court.

RESTATEMENT, *supra,* cmt. d.

No evidence has been presented on why J. Howard's instructions to Sorensen and Hunter were not followed. The court assumes that the answers to this question lie in the documents that Pierce has destroyed or refused to produce. **The court finds that the gift to provide for Vickie did not take place because Pierce fired Sorensen and conspired with Hunter to prevent**

the drafting and execution of the documents that would have accomplished the gift that J. Howard directed.

Thus Vickie has adequately shown the reasonable certainty that she would have received a substantial gift from J. Howard, in the amount that the court hereafter awards as damages.

C. Intentional Conduct

Tortious interference with an expectancy is an intentional tort. A plaintiff must show an intentional invasion or destruction of plaintiff's prospective interest or expectancy of which the defendant had actual knowledge. Reaves, *supra,* at 564. The proof must show that the defendant was aware of his or her interference and in fact intended to interfere with the expectancy. Marilyn Marmai, Note, *Tortious Interference With Inheritance: Primary Remedy or Last Recourse,* 5 Conn.Prob.L.J. 295, 301 (1991).

When Pierce learned of J. Howard's directions to arrange a trust for Vickie in December 1992, he took action with Hunter to prevent the formation of the trust and the transfer of assets from the Living Trust for Vickie's benefit. Furthermore, in July 1994, upon learning of his father's marriage to Vickie, Pierce acted to assure that the marriage did not interfere with his own expectation that he and his family would inherit all of his father's wealth. There is no doubt that this conduct was intentional and specifically intended to prevent Vickie from obtaining any of the Marshall interest in MPI and KII.

Hunter, acting on **Pierce's instructions,** failed to prepare the catch-all trust. In addition, in 1994, **again**

acting on Pierce's instructions, Hunter devised a plan to make the Living Trust irrevocable and prepared the Fine Tuning Document to permit this to take place. After J. Howard apparently signed the Fine Tuning Document, Pierce caused the Document to be altered to substitute the page that made the Living Trust irrevocable. Whether in fact the Fine Tuning Document is genuine and effective to carry out this purpose will be decided by the Probate Court in Texas.

D. Independently Tortious Conduct

The most important element of tortious interference with the expectancy of an inheritance is that the defendant's conduct must be tortious. Typical examples of this tort occur where a testator has been induced to make or not to make a bequest by fraud, duress, defamation or tortious abuse of fiduciary duty, or the tortfeasor has forged, altered or suppressed a will (or a document making a gift). RESTATEMENT § 774B, *supra,* cmt. c; *see also* Fassold, *supra,* at 27. In contrast, persuading a testator to eliminate an expectancy through legitimate means is not enough to satisfy this element. *See* Reaves, *supra,* at 564.

Pierce's tortious conduct in this case came in two phases. **First, at the end of 1992 and in early 1993 he fired Sorensen for the purpose of preventing him from arranging the gift to Vickie of the increase in value of the MPI stock, and he conspired with Hunter to prevent the preparation of the catch-all trust.** Second, he caused the altering of the Fine Tuning Document, by substituting a new second page of the document after its apparent execution to insert a provision that purported to make the Living Trust irrevocable. This

independently tortious conduct supports Vickie's claim for tortious interference with her expectancy of an inheritance from her deceased husband J. Howard.

E. Damages

Vickie offers three different measures of damages for Pierce's wrongful conduct. First, she contends that the court should award damages that equal half of everything in which J. Howard had an interest. According to Vickie's expert Wayne Elggren,[20] half of J. Howard's interest in MPI, as of August 31, 1999 (immediately before the trial in this adversary proceeding), was worth $820,489,480. This amount would give effect to J. Howard's repeated promise that she would get half of what he had.

As a second possible measure of damages, Elggren testified that J. Howard's share of the appreciation in the KII stock from December 23, 1992 to August 31, 1999 was $556,874,869. This sum would give effect to J. Howard's instructions to Sorensen on or about that date to arrange a structure to give Vickie the appreciation in value of J. Howard's interest in the KII stock.

Elggren presented a third possible measure of damages, the increase in value of the MPI stock from June 27, 1994, the date of Vickie and J. Howard's marriage, to August 31, 1999. Elggren testified that the J. Howard's interest in the MPI stock increased during this period from $741,470,693 to $1,640,978,961, an increase of

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[20] The court finds all of Elggren's testimony on this subject to be credible.

$899,508,268. Vickie's half share of this sum would be $449,754,134.

Pierce's expert Mike Hill opined that the community property value of the KII stock was $170 million. **The court denied the admission of Hill's testimony as sanctions for Pierce's discovery violations, as discussed *supra* and as provided in the court's order of May 21, 1999.**

The court finds the most appropriate measure of Vickie's damages from Pierce's tortious interference with her expectancy of a gift from J. Howard to be the lowest of these figures, $449,754,134. While J. Howard gave the instructions to make the gift in 1992, the court finds that J. Howard gave this direction in contemplation that Vickie would marry him. In fact she did, but not until 1994. The court finds it equitable to measure her damages from the date of their marriage.

Vickie has actually been damaged only to the extent that she does not receive a share of the probate estate in Texas. The probate action is in trial now, and the amount that Vickie receives in that proceeding must be deducted to determine the damages that Pierce has caused.

F. Punitive Damages

Under Texas law, damages available for the tortious interference with an expectancy of an inheritance or gift may include consequential damages, emotional distress or actual harm to reputation, and punitive damages. *See King,* 725 S.W.2d at 754; *see also* Fassold, *supra,* at 29; Reaves, *supra,* at 565. Vickie has not shown any consequential damages, emotional distress or harm to reputation. However, she does claim punitive damages against Pierce.

It appears to the court that, under Texas law, this is an appropriate case for the assessment of punitive damages. However, the determination of the amount of punitive damages must await the calculation of the compensatory damages. This calculation, in turn, must await the determination of the amount, if any, that Vickie receives from J. Howard's estate.

V. Conclusion

The court concludes that Vickie has shown, by a preponderance of the evidence admitted at trial and the findings imposed as sanctions against Pierce for discovery abuses, that Pierce has tortiously deprived her of her expectancy of a substantial *inter vivos* gift from her deceased husband J. Howard.

The court awards damages in the amount of $449,754,134, less any amount that Vickie actually recovers in the pending Probate Court action in Texas. In addition, Vickie is entitled to punitive damages in an amount that remains to be determined after her actual damages are calculated.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: VICKIE LYNN MARSHALL, Debtor, --- E. PIERCE MARSHALL, Plaintiff-counter-defendant-Appellant, v. VICKIE LYNN MARSHALL, Defendant-counter-claimant-Appellee.	No. 02-56002, 02-56067 D.C. No. CV-01-00097-DOC Central District of California, Santa Ana ORDER (Filed Feb. 16, 2005)

Before: BEEZER, KLEINFELD, and PAEZ, Circuit Judges.

The panel has voted to deny the petition for panel rehearing. Judges Kleinfeld and Paez vote to deny the petition for rehearing en banc and Judge Beezer so recommends.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.

STATUTES INVOLVED

The statutes relevant to the present petition are set forth in full as follows.

A. 28 U.S.C. § 1331 (1993)

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

B. 28 U.S.C. § 1332 (a)-(c) (1993 & Supp. 2004)

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between –

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the

plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title –

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

C. 28 U.S.C. § 1334 (1993 & Supp. 2004)

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c)(1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

(d) Any decision to abstain or not to abstain made under this subsection (other than a decision not to abstain in a proceeding described in subsection (c)(2)) is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction

of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.

(2)

No. 04-1544

IN THE

Supreme Court of the United States

VICKIE LYNN MARSHALL,

Petitioner,

v.

E. PIERCE MARSHALL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, on the facts of this case, the "probate exception" bars the exercise of bankruptcy jurisdiction over a cause of action that, under applicable Texas probate law, Petitioner was required to assert, and actually did assert unsuccessfully, in a Texas probate proceeding that Petitioner herself initiated prior to commencing her bankruptcy case.

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PRELIMINARY STATEMENT

Petitioner is Vickie Lynn Marshall, a/k/a Anna Nicole Smith ("Vickie" or "Petitioner"), widow of the late J. Howard Marshall II ("J. Howard"). Respondent is E. Pierce Marshall ("Pierce" or "Respondent"), J. Howard's son.

Prior to J. Howard's death, Vickie commenced proceedings in the Texas probate court (the "Probate Court") challenging J. Howard's estate plan (the "Estate Plan"). As part of her challenge, she alleged that J. Howard intended to give her a gift worth tens of millions of dollars and that Pierce interfered. Following a five-month jury trial, the Probate Court validated the Estate Plan; concluded that J. Howard did not intend to give Vickie a gift; and dismissed Vickie's claim against Pierce.

During the probate proceedings, Vickie filed for bankruptcy in Los Angeles and there pursued the very claim against Pierce that she was already pursuing in the Probate Court. In both proceedings, Vickie styled her claim as one for tortious interference with an expectancy of a gift ("Vickie's Claim" or "Claim"). In a bizarre series of events, the bankruptcy court awarded Vickie $474 million on her Claim as a sanction for alleged discovery abuse that Pierce did not commit. The bankruptcy court thereafter enjoined further proceedings in the Probate Court. On appeal, the federal district court vacated the bankruptcy court's $474 million award and reversed its injunction. Thereafter, the Probate Court entered its judgment, as discussed above.

After the Probate Court entered its judgment, the district court, purporting to exercise bankruptcy jurisdiction, held further proceedings and concluded, directly contrary to the prior probate judgment, that J. Howard's Estate Plan was invalid and that Vickie was entitled to $89 million on her Claim. The Ninth Circuit vacated the district court's judgment and directed the dismissal of Vickie's Claim, concluding that the bankruptcy and district courts lacked jurisdiction to adjudicate Vickie's Claim

under the "probate exception" to federal jurisdiction (the "Probate Exception").

To succeed on her Claim against Pierce, Vickie had to establish a legitimate expectancy of a gift from J. Howard. After all, if J. Howard never intended to give Vickie a gift, then Pierce could not possibly have interfered. Under Texas law, the Probate Court had exclusive jurisdiction to determine whether J. Howard intended to give Vickie a gift as part of its probate function of determining all claims to the decedent's property, whether based on a theory of gift, bequest, or otherwise. The bankruptcy and district court's adjudication of J. Howard's intentions concerning the disposition of his assets unquestionably usurped the Probate Court's exclusive jurisdiction to resolve this issue.

Vickie also had to establish that the Estate Plan was invalid. If the Estate Plan directing the distribution of J. Howard's property to persons other than Vickie was valid, then Vickie's Claim was foreclosed because Texas law does not allow a cause of action for an alleged expectancy of property contrary to a validated estate plan. The validity of the Estate Plan, however, also is a question within the exclusive jurisdiction of the Probate Court. Once again, the bankruptcy and district court's adjudication of the validity of the Estate Plan usurped the Probate Court's exclusive jurisdiction.

The Probate Exception exists precisely to prevent such interference. In reaching its conclusion that the Probate Exception applies, the Ninth Circuit simply followed this Court's precedents, and its decision does not conflict with the decisions of any other court of appeals. Vickie's Claim also is otherwise barred as a matter of law by the doctrines of *res judicata* and collateral estoppel, owing to the Probate Court's prior judgment disposing of Vickie's Claim. This case thus presents no occasion for certiorari review and the Petition should be denied.

STATEMENT OF THE CASE

J. Howard and Vickie were married in 1994, when he was eighty-nine and she was twenty-six. ER[1] 95, 2420. J. Howard died fourteen months later. ER 95. During his lifetime, J. Howard gave Vickie gifts worth in excess of $6 million, paying for them largely with borrowed funds. He made no provision for Vickie in his Estate Plan and left most of his remaining assets (as well as substantial debts) to Pierce. Vickie claims that, contrary to the terms of his Estate Plan, J. Howard intended to give her a gift worth tens of millions of dollars and that Pierce should be liable for J. Howard's failure to do so.

In 1982, long before he met Vickie, J. Howard began conveying and transferring most of his property to a living trust established under a written trust instrument (the "Trust"). ER 1018, 2623. From 1982 until his death, J. Howard executed a series of amended and restated trust instruments governing the terms of the Trust. ER 131, 1453-55. J. Howard's principal goal in creating the Trust was to provide a mechanism for the distribution of his property upon his death. ER 5004-05. Each trust instrument identified the beneficiaries who would receive J. Howard's property after his death. ER 131, 146, 225, 261-62, 264, 289, 352, 392, 510, 528, 644.

J. Howard retained the beneficial interest in the Trust during his lifetime and received income derived from the Trust's assets. ER 146, 225, 528, 644, 789, 5268. J. Howard kept all of his assets in the Trust and, from time to time, trust assets were exchanged and transferred for estate-planning purposes. ER 1018, 2623. On July 13, 1994, two weeks after he married Vickie, J. Howard executed his final amended and restated Trust

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[1]The term "ER" refers to certain "excerpts of record" filed in the Ninth Circuit pursuant to that court's local rules.

instrument, fixing the terms of the Trust. ER 3264-3268. J. Howard made no provision in the Trust for Vickie.

J. Howard also left a series of wills. ER 131, 264, 510, 819, 4712. His last will (the "Will"), like all of his previous wills after 1982, was a "pourover" will, meaning that it left all of his property not already in the Trust to the Trust to be distributed after his death in accordance with the Trust's terms. ER 510, 514-16. As a result, the Trust, rather than the Will, held all of J. Howard's assets and specified how his property would be distributed upon his death. The Trust is thus what is known as a "will substitute." The Trust and the Will are collectively referred to herein as the "Estate Plan."

At no time did J. Howard ever make Vickie a beneficiary under his Will or Trust (other than with respect to certain real estate that he ultimately transferred to her out of the trust shortly after their marriage); nor did he add her as a beneficiary. ER 95, 510, 647-51, 819, 1018, 2498, 2633. There are no drafts of either document that name Vickie as a beneficiary. Pierce did not destroy, alter, or suppress any document purporting to reflect, provide, or establish any gift to Vickie, and there is no evidence to substantiate Vickie's unfounded claim that he did. In fact, the evidence establishes that J. Howard never intended to give Vickie the gift that she asserts, as conclusively found by the only court with jurisdiction to decide this matter: the Texas Probate Court.

The Probate Proceedings

In the Texas probate proceedings that Vickie herself initiated -- a fact omitted from the Petition -- Vickie challenged the Estate Plan on various grounds, including that J. Howard intended to give her a multi-million dollar gift and that Pierce tortiously interfered with her expectancy of this alleged gift (the

"Probate Case").[2] Vickie's Claim is inconsistent with, and strikes at the heart of, the Estate Plan. Because J. Howard kept all of his assets in the Trust, it is simply not possible that he could have made a gift to Vickie worth tens of millions of dollars other than from the Trust. As a matter of law and logic, either J. Howard intended that his assets would be used and distributed as set forth in the Trust, or he intended some other disposition that included a gift to Vickie. Both cannot be true.

J. Howard's intent with regard to the disposition of his assets is a critical element of Vickie's Claim: If J. Howard never intended to give Vickie a gift, then it is not possible that Pierce interfered and, thus, Vickie has no claim against Pierce. So too, J. Howard's intent concerning the disposition of his assets was the essential focus of the Probate Case: The whole point of the Probate Case was to determine J. Howard's true intentions regarding the disposition of his property -- whether through an uncompleted *inter vivos* gift (as Vickie claims), or distributions from the Trust to named beneficiaries (as the Estate Plan provides), or otherwise -- and to sort out all of the competing claims to those assets, regardless of the theory of the claims.

The Texas Probate Code mandates that Texas probate courts have exclusive jurisdiction over "any cause of action

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[2]Vickie commenced proceedings in the Probate Court in April 1995, several months prior to J. Howard's death, seeking a declaration concerning the Trust's validity, ER 5620, and alleging that Pierce had tortiously interfered with her property rights with respect to J. Howard's assets, ER 5615-17. Three days after J. Howard died, Vickie filed a further application in the Probate Court, seeking a declaration that J. Howard had died intestate. ER 816-18. Pierce opposed this application and sought to admit his father's Will into probate. ER 836-45. Vickie thereafter contested the Will in the Probate Court, ER 5523-31, and later challenged the validity of the Estate Plan and pursued her Claim against Pierce in the Probate Case, ER 1319-31, 2863-65.

appertaining to estates or incident to an estate." TEX. PROB. CODE ANN. §§ 5, 5A, & 5A(b) (Vernon 1999)[3] (all such causes of action "shall be brought in a statutory probate court rather than in the district court"). A matter "appertains" to or is "incident" to an estate if it involves a matter "relating to the settlement, partition, and distribution of estates of deceased persons." *Id.*, § 5A(a). This includes all "claims" to the decedent's assets. *Id.* In each of her petitions in the Probate Court, Vickie asserted that the Probate Court was vested with general probate jurisdiction to hear and decide all of her claims, including her claim that J. Howard intended to give her a gift and that Pierce interfered, styled as a claim for tortious interference with an expectancy of a gift. ER 2842, 2862-65.

During its five-month jury trial, the Probate Court heard the testimony of over forty witnesses and received hundreds of items of evidence. ER 4066-71, 4706-27. On August 15, 2001, the Probate Court entered its final judgment, disposing of all claims and issues related to J. Howard's intended disposition of his property, including Vickie's Claim. ER 4001. On December 7, 2001, the Probate Court entered its second amended final judgment (the "Probate Judgment"). ER 4706. The Probate Court admitted J. Howard's Will to probate, finding the Will and Trust to be genuine and valid and not the product of improper conduct. ER 4714-15, ER 4717.

With respect to Vickie, the Probate Court concluded that it had "exclusive" jurisdiction under Texas law over Vickie's claims and rights, including any claim regarding "the making of any *inter vivos* or testamentary gift or transfer by [J. Howard] of any of his property." ER 4712. The Probate Court further determined that any and all claims by Vickie regarding J. Howard and his property, "including but not limited to claims

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[3]Although the Texas Probate Code has since been amended, the 1999 version applies here.

that [J. Howard] intended but failed to give her or to leave her any portion of such property during his life or upon his death, were required by law to have been asserted as compulsory counterclaims in this proceeding." ER 4720-21. The Probate Court specifically ruled that "[J. Howard] did not intend to give and did not give to [Vickie] a gift or bequest from the Estate of [J. Howard] or from the [Living Trust] either prior to or upon his death" and "that [Vickie] does not possess any interest in and is not entitled to possession of any property within the Estate of [J. Howard] or any property [of the Trust] because of any representations, promises, or agreements." ER 4721. The Probate Court also held that (1) all of Vickie's claims were resolved and dismissed; (2) Vickie was entitled to "take nothing" from Pierce; and (3) Pierce was entitled to his inheritance free and clear of any claim by Vickie. ER 4718-19, ER 4721.

Others challenged the validity of the Estate Plan, and the Probate Court's statutory mandate was to resolve all challenges in order to determine the proper disposition of J. Howard's assets. Indeed, unless and until the court did so, it could not determine whether, among other things, J. Howard's assets should go to satisfy Vickie's Claim, or, instead, to fund J. Howard's bequests under the terms of his Estate Plan. While Vickie contends that her claims in this case do not involve J. Howard's Estate Plan and do not touch upon the Probate Court's function or the issues that the Probate Court was required to resolve, Pet. 7-10, 17-18, this is obviously untrue. As the Probate Court explained:

> A complaint was filed with respect to the will [J. Howard] signed in 1979, and every transaction he undertook after that, every Trust he set up, every transaction, every gift he made, every conveyance he made, all of those were challenged. They are all before the Court. . . .
>
> So the point is I am not limited to what was in the Estate on the date of death. This is a will contest. If the wills

> had been set aside, if the Trust had been set aside, then it all would have been back in his Estate. That's what you were trying to do until you nonsuited in January. That's what [J. Howard's other son] was trying to do through the verdict, was to get all of that set aside and put back in the Estate so all of that would be in the Estate.

SER[4] 8665.

Under Texas law, once a probate court validates an estate plan, all claims and causes of action based on expectancies contrary to the plan are foreclosed. *Thompson v. Deloitte & Touche*, 902 S.W.2d 13, 16 (Tex. App. 1995) (probate judgment establishing validity of decedent's intended scheme of distribution precludes tortious interference claim based on expectancy of a different distribution); *Neill v. Yett*, 746 S.W.2d 32, 35 (Tex. App. 1988) (same). Any party who wishes to pursue a claim based on an unfulfilled expectancy of property is required to pursue the claim in the probate court, or be forever barred from doing so. The Probate Court explained to Vickie:

> Your claim to anything that [J. Howard] had at any time in his life is over when this final judgment is signed. The fact that the Rules of Civil Procedure allow you to take a nonsuit and re-file later doesn't really apply in Probate Court when we're talking about who is entitled to an Estate. Once I decide who is entitled, you can't wait until that's all over with and then say, "Okay. Now I can come in and file my claim."

SER 8661. The Probate Court stated further:

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[4]The term "SER" refers to "supplemental excerpts of record," filed with the Ninth Circuit.

> I am not going to leave open any question . . . of what . . . he had and what he did with it and whether that was proper or improper. All of that was before the Court. [J. Howard's other son] complained of every transaction that was done since 1979. Every transaction in connection with his estate plan was before this Court, and all of those transactions were found to be valid by the jury, and the Court is going to find them to be valid.

SER 8663.

The Bankruptcy Proceedings

On January 25, 1996, during the Probate Case, Vickie filed a bankruptcy case in Los Angeles. ER 2642. On June 14, 1996, Vickie asserted in the federal bankruptcy court the same Claim against Pierce that she had raised in the Probate Court -- that J. Howard intended to give her a gift worth tens of millions of dollars and that Pierce interfered. Pierce moved to dismiss Vickie's Claim for lack of subject matter jurisdiction, arguing that the Probate Court had exclusive jurisdiction over Vickie's Claim and that the Probate Exception barred federal jurisdiction over the Claim. The bankruptcy court denied the motion.

Following a press conference at which the presiding judge invited the media in open court to ask the judge questions about the case (which they did and which he answered), the bankruptcy court conducted a series of hearings on Vickie's Claim. At these hearings, the court severely circumscribed Pierce's presentation of evidence and made findings of fact adverse to him as an unfounded sanction for alleged discovery abuse that Pierce never committed and that was never proven. ER 2173-75, 8641-49. These sanctions effectively resolved Vickie's Claim in her favor. The bankruptcy court entered its initial sanctions order on February 2, 1999 (the "Initial Sanctions Order"), which deemed various matters to be established for purposes of resolving Vickie's Claim, including that J. Howard

intended to leave her a substantial inheritance and that Pierce had tortiously interfered with Vickie's rights. ER 2172-74.

In September 1998, Pierce moved to withdraw the case to the district court. ER 2019. On October 19, 1998, the district court (Keller, J.) withdrew the matter, but left the bankruptcy court free to resolve pending discovery disputes. ER 2038-39, 2043. Judge Keller remarked at the hearing: "As I view this case overall, . . . essentially we are talking about a probate lawsuit here. Okay? And this should be resolved . . . in the Probate Court in Texas." ER 2036-37.

On January 12, 1999, the bankruptcy court stated that it intended to submit a secret memorandum (the "Secret Memo") to the district judge "to assist in his review of the matter," and that the Secret Memo would not be available to Pierce. Jan. 12 Hrg. Tr. at 5, T1017-18, 1023, 1034. The Secret Memo has never been disclosed. ER 2207-08.

The district court vacated the Initial Sanctions Order as lacking evidentiary support and remanded. ER 2211, 5744-49. Acknowledging receipt of the Secret Memo, the court also vacated its prior withdrawal of the case, sending it back to the bankruptcy court. ER 5744-49. On May 20, 1999, the bankruptcy court re-imposed its sanctions in a form virtually identical to the vacated Initial Sanctions Order (the "Final Sanctions Order"). ER 2235-39. The bankruptcy court never conducted an evidentiary hearing to establish Pierce's alleged discovery abuse; nor did any witness ever testify as to the alleged abuse. The court simply accepted the unsubstantiated, untrue, and contested accusations of Vickie's counsel.

On September 27, 2000, the bankruptcy court issued a decision concluding that Vickie had an expectancy of an inheritance, based on a "widow's election" theory that Vickie never argued or briefed, and awarding Vickie $449,754,134. On October 6, 2000, the bankruptcy court *sua sponte* issued a revised opinion, in which the court abandoned its "widow's

election" theory and deemed that Vickie had an expectancy of a substantial portion of J. Howard's wealth. Pet. App. 215. Concluding on the basis of presumed facts that Pierce interfered with this expectancy, the court again awarded Vickie $449,754,134, calculated, in part, on the court's view of the increase in the price of oil. Pet. App. 219-21. This calculation was arbitrary, as J. Howard did not receive any significant portion of his income from oil production and there was no evidence that any increase in the price of oil generated any income to him. On November 21, 2000, the bankruptcy court assessed punitive damages against Pierce in the amount of $25 million, and on December 29, 2000, entered judgment in Vickie's favor in the total amount of approximately $474 million (the "Bankruptcy Judgment"). Pet. App. 44. At Vickie's request, the bankruptcy court also enjoined ongoing proceedings in the Probate Court.

The District Court Proceedings

Pierce appealed the Bankruptcy Judgment to the district court (Carter, J.), which vacated the Bankruptcy Judgment on June 20, 200, and reversed the bankruptcy court's injunction on August 13, 2001. ER 3989. Thereafter, the Probate Court entered its Probate Judgment validating the Estate Plan; concluding that J. Howard did not intend to give Vickie a gift; and dismissing Vickie's Claim. Pierce then moved in the district court to dismiss Vickie's Claim on the grounds that it was barred by the doctrines of claim and issue preclusion. The court denied the motion and also affirmed the bankruptcy court's determination that the Probate Exception did not bar federal jurisdiction over Vickie's Claim. Asserting its own bankruptcy jurisdiction, the district court conducted a "*de novo*" review of Vickie's claim. The court refused to hear many of Pierce's percipient witnesses, but heard all of Vickie's witnesses. The district court awarded Vickie $88,585,534.66 on her Claim (the "District Court Judgment"), concluding that J. Howard's signature on the Trust was forged; that the Estate Plan did not reflect J. Howard's true intentions; and that Pierce had thwarted

J. Howard's intent to give Vickie an alleged gift by engaging in illegitimate "estate planning transactions for J. Howard." Pet. App. 78-147. The district court did not reach the issue of whether Pierce committed discovery abuse and declined to consider the bankruptcy court's sanctions rulings.

The Decision of the Court of Appeals

In vacating the District Court Judgment, the Ninth Circuit first held that the Probate Exception applies in bankruptcy cases. Pet. App. 26. In doing so, the court relied on *Harris v. Zion Sav. Bank & Trust Co.*, 317 U.S. 447 (1943), in which this Court applied the Probate Exception to bar the exercise of bankruptcy jurisdiction over a decedent's property. As the Ninth Circuit observed, no court of appeals has held that the Probate Exception does not apply in bankruptcy cases.

Second, the Ninth Circuit concluded that "[t]he reach of the probate exception encompasses not only direct challenges to a will or trust, but also questions which would ordinarily be decided by a probate court in determining the validity of the decedent's estate planning instrument." Pet. App. 29. The court observed that "[s]uch questions include fraud, undue influence upon a testator, and tortious interference with the testator's intent." *Id.* In reaching this conclusion, the Ninth Circuit relied on this Court's decision in *Sutton v. English*, 246 U.S. 199 (1918), in which the Court applied the Probate Exception after construing Texas probate law as bestowing exclusive jurisdiction on a Texas probate court to determine a claim of undue influence. The Ninth Circuit's application of *Sutton* is consistent with the decisions of other courts of appeals.

Third, the Ninth Circuit concluded that the district court's determination that J. Howard intended to give Vickie a gift and that the Trust was invalid conflicted with the Probate Judgment and interfered with the Probate Court's exclusive jurisdiction under Texas law to decide these issues. Pet. App. 30-32. The court reasoned that "[a]lthough [Vickie] styles her

action as a tort action, it is clear that the exercise of federal jurisdiction would, and, in this case, did interfere with the Texas probate court proceedings." Pet. App. 31. Stating that the form of Vickie's claim was not controlling, the court observed: "When the district court entered a judgment in favor of [Vickie] in the form of a damage award based on what the court thought she should have received from [J. Howard's] estate, the power of the Texas probate court was negated." Pet. App. 32. The Ninth Circuit's decision is consistent with the decisions of other courts of appeals on the same point. Pet. App. 31-32.

Fourth, the Ninth Circuit rejected Vickie's contention that the Probate Exception does not apply because J. Howard's principal estate planning instrument is a trust rather than a will, recognizing that a living trust is a "will substitute" and that the Trust "not only controlled the distribution of [J. Howard's] property during his lifetime, but also provided for the post mortem disposition of trust property." Pet. App. 33. This conclusion is consistent with this Court's decision in *Princess Lida of Thurn & Taxis v. Thompson*, 305 U.S. 456 (1939), upholding the exclusive jurisdiction of a state probate court to resolve matters arising out of a trust, and in accord with the decisions of other courts of appeals. Pet. App. 33.

Finally, the Ninth Circuit rejected Vickie's argument that the Probate Exception does not apply because Vickie's Claim alleges interference with an *inter vivos* gift, rather than a testamentary gift. Because Vickie never received the gift she alleges, under Texas law, she held, at most, a claim for an unfulfilled expectancy of a gift. The Ninth Circuit recognized that, in order to fulfill its probate function of dividing a decedent's property among competing claimants, "the state probate court must have exclusive *in rem* jurisdiction over all claims either against or on behalf of the decedents estate" whether based on "a theory of tax liability, debt, gift, bequest, tort, or any other theory." Pet. App. 34. The court concluded that Vickie could not escape the Probate Court's exclusive *in rem* jurisdiction by crafting her gift claim as a tort action, and

that she is bound by the procedures and restrictions of Texas law. Pet. App. 35-36. This ruling is likewise in conformity with the decisions of other courts of appeals.

REASONS FOR DENYING THE PETITION

The decision below follows this Court's precedents mandating that the touchstone for application of the Probate Exception is interference with a probate court's jurisdiction over functions assigned to it under applicable state law. Moreover, as this Court has determined, the Probate Exception applies in bankruptcy, and likewise bars federal jurisdiction over an undue influence claim that, under Texas law, must be adjudicated in a Texas probate court.

The decision below does not conflict with the holding of any other court of appeals. The Petition attempts to create a conflict where one does not exist by conflating very different cases that have decided very different issues. In applying the Probate Exception, courts routinely consider two key issues: (1) the substance (versus the form) of the particular claim presented in federal court; and (2) the nature and scope of the particular state probate system in question. Because different states have different probate systems; assign different functions to their probate courts; and recognize different kinds of probate claims, some claims that must be brought in the probate courts in some states need not be brought in the probate courts in others. The interference analysis required under the Probate Exception thus varies depending on these considerations. Unlike other states, Texas has an exceptionally comprehensive probate system and no court of appeals considering such a system has held that the Probate Exception does not apply to claims such as Vickie's Claim.

The Ninth Circuit's decision is also correct. In considering whether federal adjudication of a particular claim impermissibly interferes with probate jurisdiction, courts consider whether resolution of the claim would (1) require the

federal court to probate a will or administer an estate; (2) interfere with the probate court's determination of substantive issues that the probate court must resolve in performing its essential probate functions under state law; (3) require the federal court to assume jurisdiction in derogation of the probate court's exclusive jurisdiction over certain matters; or (4) interfere with the probate court's custody of property within its control. Consistent with the decisions of other courts of appeals, the Ninth Circuit properly concluded that the Probate Exception applies in this case because federal adjudication of Vickie's Claim would contravene the second and third factors.

This case does not present a proper vehicle for certiorari review in any event because, even if the Probate Exception did not apply, Vickie's Claim is barred by the doctrines of *res judicata* and collateral estoppel. Accordingly, the Petition should be denied.

A. The Decision Below Comports With This Court's Precedents.

For nearly two hundred years, this Court has repeatedly enforced the Probate Exception, holding that federal courts, including bankruptcy courts, lack subject matter jurisdiction over probate matters and may not interfere with the administration of probate cases. *E.g.*, *Markham v. Allen*, 326 U.S. 490, 494 (1946); *Harris*, 317 U.S. at 450; *Sutton*, 246 U.S. at 205; *Farrell v. O'Brien*, 199 U.S. 89, 114-16 (1905); *Byers v. McAuley*, 149 U.S. 608, 619 (1893); *In re Broderick's Will*, 88 U.S. 503, 515-20 (1874); *Armstrong v. Lear*, 25 U.S. 169, 175-76 (1827). "[O]ccasional departures from the rule are always carefully placed on such special grounds that they tend rather to establish than to weaken its force." *Broderick's Will*, 88 U.S. at 510.

1. Texas probate law and Vickie's Claim

Under Texas law, "any cause of action appertaining to estates or incident to an estate shall be brought in a statutory

probate court rather than in the district court." TEX. PROB. CODE ANN. § 5A(b); *see In re Graham*, 971 S.W.2d 56, 59 (Tex. 1998); *Bailey v. Cherokee County Appraisal Dist.*, 862 S.W.2d 581, 585-86 (Tex. 1993); *Perfect Union Lodge of San Antonio v. Interfirst Bank of San Antonio*, 748 S.W.2d 218, 221 (Tex. 1988); *English v. Cobb*, 593 S.W.2d 674, 676 (Tex. 1979). A matter "appertains" or is "incident" to an estate if it involves a matter "relating to the settlement, partition, and distribution of estates of deceased persons," including all "claims" to the decedent's assets. TEX. PROB. CODE ANN. § 5A(a); *Bailey*, 862 S.W.2d at 585. These concepts are construed broadly: "An action is 'incident or appertaining' to an estate when the outcome will have a direct bearing on the assimilation, collection, and distribution of the decedent's estate." *Falderbaum v. Lowe*, 964 S.W.2d 744, 747 (Tex. App. 1998).

Texas has a comprehensive probate system. TEX. PROB. CODE ANN. §§ 1 *et seq.*; *Sutton*, 246 U.S. at 207-08; *Graham*, 971 S.W.2d at 59; *Bailey*, 862 S.W.2d at 586; *Perfect Union Lodge*, 748 S.W.2d at 221; *In re Ramsey*, 28 S.W.3d 58, 62-63 (Tex. App. 2000); *Pullen v. Swanson*, 667 S.W.2d 359, 362 (Tex. App. 1984). The Texas probate court is the exclusive forum to determine all unsatisfied expectancies of, or claims to, a share of the decedent's property -- whether based on a theory of debt, gift, or bequest -- because, until the court does so, it cannot conclusively resolve the proper distribution of the decedent's assets. *Bailey*, 862 S.W.2d at 586 (tax claim); *Swanson*, 667 S.W.2d at 362 (promissory note). The Texas probate court also has the power to protect its exclusive jurisdiction by transferring cases to its own docket. TEX. PROB. CODE ANN. § 5B.

Texas probate courts generally have concurrent jurisdiction with other state courts over "all actions involving an *inter vivos* trust." TEX. PROB. CODE ANN. §§ 5(e) & 5A(c)(2). However, "[i]n situations where the jurisdiction of a statutory probate court is concurrent with that of a district court, any cause of action appertaining to estates or incident to an estate shall be brought in a statutory probate court rather than in the district

court." *Id.*, § 5A(b). Thus, any matter involving an *inter vivos* trust that is also "incident" to an estate or "appertaining" to an estate lies within the probate court's exclusive jurisdiction. *Id.*, § 5(d) (all applications, petitions and motions regarding "probate" must be filed and heard in a probate court); *Perfect Union Lodge*, 748 S.W.2d at 221 (probate court had jurisdiction over decedent's trust governing the disposition of his assets).

Texas probate proceedings are actions *in rem*, binding on all persons unless set aside in the manner provided by law. *Mooney v. Harlin*, 622 S.W.2d 83, 85 (Tex. 1981); *Ladehoff v. Ladehoff*, 436 S.W.2d 334, 336 (Tex. 1968). Texas courts have consistently refused to allow a litigant to sue in tort for interference with the expectancy of an inheritance where the decedent's will is upheld in probate court. *Thompson*, 902 S.W.2d at 16; *Yett*, 746 S.W.2d at 35. Moreover, "the facts involved and the relief requested are determinative as opposed to the label by which the claim is called. Simply put, the substance of what is pled controls, not the label or name appended to the claim." *Tri-State Chems., Inc. v. Western Organics, Inc.*, 83 S.W.3d 189, 194 (Tex. App. 2002).

Implicitly acknowledging the need to present her Claim in the Probate Court, Vickie herself commenced the Probate Case and there pursued her Claim as both a tort action against Pierce and a suit to set aside J. Howard's Estate Plan. The Probate Court exercised its exclusive jurisdiction, ruling that J. Howard did not intend to give Vickie a gift and that the Estate Plan was not tainted by misconduct of anyone, including Pierce. ER 4714-15, 4717, 4721. The Probate Court's validation of the Estate Plan foreclosed all claims based on expectancies of property not validated in the Probate Judgment. *Thompson*, 902 S.W.2d 13 at 16; *Yett*, 746 S.W.2d at 35. Having commenced the Probate Case, Vickie cannot contend that she is immune from the outcome. *Broderick's Will*, 88 U.S. at 509-19; *Maxfield v. Terry*, 885 S.W.2d 216, 219 (Tex. App. 1994). Even if she had not participated, she is bound by the Probate Judgment validating the Estate Plan. *Ladehoff*, 436 S.W.2d at 336.

Vickie's contention that she is not attacking the Estate Plan but merely asserting a tort claim is disingenuous. As noted, the alleged gift had to come from somewhere, and the Trust is the only source because J. Howard kept all of his assets there. Either J. Howard intended to distribute all of his property to persons other thar Vickie (in which case she has no claim of any kind), or he intended to give Vickie the gift that she claims. A decedent can have only one legally valid set of intentions regarding the disposition of his assets, and that is the set validated by the probate court's judgment, which forecloses any claim based on a contrary expectation.

While Vickie contends that she challenges Pierce's conduct in transferring property to and from the Trust to prevent J. Howard from making a gift to her, this argument is baseless and was resolved against her in the Probate Case. More important, under Texas law, the question whether anyone improperly transferred a decedent's property before the decedent's death also is a probate matter. *Cobb*, 593 S.W.2d at 676; *Ramsey*, 28 S.W.3d at 64. If any property was improperly transferred from the Trust, that property was recoverable in the Probate Case for the benefit of all those holding legitimate claims to J. Howard's assets. Accordingly, that issue was properly for the Probate Court to decide.

2. The decision below comports with *Sutton* and *Markham*.

This Court previously construed the Probate Exception in the specific context of Texas probate jurisdiction in *Sutton v. English*, 246 U.S. 199 (1918), a dispute that purportedly concerned title to real estate but required consideration of a decedent's intentions concerning the distribution of her property. In *Sutton*, the Court explained that federal jurisdiction does not extend to matters "incidental or ancillary to the probate" or to "questions relating to the interests of heirs, devisees, or legatees, or trusts affecting such interests," that may not be determined "without interfering with probate or assuming general

administration." 246 U.S. at 205 (citations omitted). In holding that the federal court lacked jurisdiction, the Court considered the nature and extent of the jurisdiction of Texas courts with respect to probate matters. *Id.* at 205-07. Recognizing that, under Texas law, the probate court had exclusive jurisdiction over matters incidental to the administration of estates, the Court applied the Probate Exception to protect the exclusive jurisdiction of the Texas probate court to resolve issues of undue influence. *Id.* at 207-08. *Sutton* controls here and the Ninth Circuit's decision clearly comports with it.

To create an argument that the Ninth Circuit's decision exceeds the scope of the Probate Exception as set forth in *Markham v. Allen*, 326 U.S. 490 (1946), Vickie misrepresents *Markham* and improperly limits it scope, erroneously stating that, under *Markham*, the Probate Exception "is violated only when a federal court probates a will or distributes estate assets." Pet. 11. No such statement appears in *Markham* or in any other decision of this Court.

In *Markham* -- a federal-question case concerning the wartime substitution of the United States for certain foreign national beneficiaries of an estate -- this Court held that federal courts may entertain suits to establish claims against a decedent's estate "***so long as*** the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court." 326 U.S. at 494 (emphasis supplied). Critically, *Markham* did not involve federal-court adjudication of either the validity of the decedent's estate plan or questions concerning the decedent's intent. 326 U.S. at 495-96. Instead, the role of the federal court was limited to merely substituting the United States for certain foreign beneficiaries, pursuant to a federal statute, after the probate issues had been resolved. Thus, the federal court had no occasion to address any substantive probate matters.

In *Markham*, the Court found that the Probate Exception did not apply because there was no interference with the probate

court's probate function. The instant controversy, of course, is quite different. Vickie's Claim requires the court to determine J. Howard's intended distribution of his assets. Although Vickie labels her Claim as one in tort, she was required by Texas law to bring her Claim as part of the Probate Case resolving all controversies concerning J. Howard's intended distribution of his assets. Here, the lower federal courts adjudicated the validity of the Estate Plan and estate-planning transactions and whether J. Howard intended to give Vickie a large gift contrary to his Estate Plan. The decision below correctly concluded, fully consistent with *Markham*, that, "[a]lthough Vickie . . styles her action as a tort action, it is clear that the exercise of federal jurisdiction would and, in this case, did interfere with the Texas probate court proceedings." Pet. App. 31.

The framework set forth in *Moser v. Pollin*, 294 F.3d 335, 340-45 (2d Cir. 2002), adopted and applied by the Ninth Circuit in this case, derives directly from, and is fully consistent with, the principles enunciated in *Sutton* and *Markham*. As noted, under *Moser*, courts look at several factors to determine whether federal adjudication of a claim would impermissibly interfere with a probate court's jurisdiction, specifically considering whether resolution of the claim would (1) require the federal court to probate a will or administer an estate; (2) interfere with the probate court's determination of substantive issues that the probate court must resolve in performing its essential probate functions under state law; (3) require the federal court to assume jurisdiction in derogation of the probate court's exclusive jurisdiction over certain matters; and (4) interfere with the probate court's custody of property within its control. Pet. App. 27-28; *Moser*, 294 F.3d at 340.

In this case, the Ninth Circuit observed, *inter alia*, that "[t]he district court specifically determined that the trust was forged and was procured by fraud in direct and irreconcilable conflict with the Texas probate court's judgment," Pet. App. 30; "[t]he bankruptcy court's judgment was based specifically on [Vickie]'s interest in [J. Howard]'s estate," *id.*; "[t]he district

court's damages award is likewise based on the theory that property that was distributed from the trust estate . . . to [Pierce] should have been distributed to [Vickie] instead," *id.* at 31; the district court's damage award "negated" the power of the Texas probate court," *id.* at 32; and that, "when it granted damages 'in the amount that [J. Howard] intended to give her,'" the district court "bypassed" the trust terms held by the Probate Court to be valid, *id.* Consistent with *Markham* and *Sutton*, the Ninth Circuit correctly held that, "[b]y declaring that the trust was invalid, the bankruptcy and district courts directly interfered with the Texas probate court's administration of the decedent's estate." *Id.* at 33.

3. This Court has applied the Probate Exception in bankruptcy.

This Court has twice considered application of the Probate Exception in federal-question cases -- in *Markham* and in *Harris v. Zion Sav. Bank & Trust Co.*, 317 U.S. 447 (1943). If the Probate Exception does not apply in federal-question cases such as bankruptcy, one would expect the Court to have said so. But the Court has not said so. On the contrary, in *Harris* -- which Vickie mentions in a footnote -- the Court applied the Probate Exception to overturn a bankruptcy court's assertion of bankruptcy jurisdiction under an express statutory grant.

In *Harris*, the decedent farmer commenced a bankruptcy case before her death. After she died, the bankruptcy court abated (dismissed) her case. The administrator of the decedent's probate estate petitioned to revive her bankruptcy case to take advantage of provisions of the Bankruptcy Act that would have allowed the recovery of property previously taken from the decedent through foreclosure by the defendant bank. The Utah Supreme Court determined that the Utah probate code did not authorize a probate administrator to invoke bankruptcy procedures. 317 U.S. at 449. Nevertheless, the administrator pursued the bankruptcy case.

Section 75c of the former Bankruptcy Act expressly authorized the deceased farmer's representative to pursue bankruptcy on the decedent's behalf: "A [bankruptcy] petition may be filed by any farmer [seeking to reorganize its affairs through composition]." *Harris*, 317 U.S. at 449. Section 75r defined "farmer" to include "the personal representative of a deceased farmer." *id.* Section 8 of the Act expressly provided that the death of a bankrupt "shall not abate the proceedings, but shall be conducted and concluded in the same manner, so far as possible, as though he had not died." *Id.* at 454. In spite of these express statutory provisions, this Court affirmed dismissal of the case on the ground that allowing the case to proceed would interfere with the disposition of the decedent's property under Utah probate law. In reaching its conclusion, the Court recognized that Utah law did not authorize resort to a bankruptcy court for adjudication of matters involving the disposition of the decedent's property. The Court reasoned:

> When we reflect that the settlement and distribution of decedents' estates and the right to succeed to the ownership of realty and personalty are peculiarly matters of state law; that the federal courts have no probate jurisdiction and have sedulously refrained, even in diversity cases, from interfering with the operations of state tribunals invested with that jurisdiction, we naturally incline to a construction of . . . [section] 75 consistent with these principles.

317 U.S. at 450. The Court concluded: "The probate court, not the bankruptcy court, is the appropriate forum for weighing the respective benefits or detriments to those who share in the equity of the decedent's estate." *Id.* at 452.

Unlike the former Bankruptcy Act, no provision of the current Bankruptcy Code expressly provides that bankruptcy courts have jurisdiction over probate matters. But even if one did, *Harris* demonstrates conclusively that the Bankruptcy Code

cannot be construed to permit interference in probate affairs. The Probate Exception applies in bankruptcy.

4. Vickie's claim is not *inter partes* and the Probate Exception applies to her gift theory.

Vickie asserts that the Probate Exception does not apply because her tort claim is not directed at the Estate Plan but is an *inter partes* claim directed at an individual (Pierce) who received the benefit of the Estate Plan. Pet. 7-10, 17-18. Vickie's assertion that application of the Probate Exception turns on whether a claim may be labeled as *inter partes* is without merit.

A party cannot circumvent exclusive probate jurisdiction by artful pleading and, as numerous courts have found, including the Ninth Circuit in the decision below, the label a litigant uses in framing a claim is not controlling. *Moser*, 294 F.3d at 340-41; *Moore v. Graybeal*, 843 F.2d 706, 710 (3d Cir. 1988); *Dragan v. Miller*, 679 F.2d 712, 716-17 (7th Cir. 1982). Vickie seeks to recover in tort damages equal to the gift that she says represents her share of J. Howard's assets. But Vickie cannot seek indirectly in tort what she properly should have sought (and did seek unsuccessfully) in the Probate Court. *Storm v. Storm*, 328 F.3d 941, 947 (7th Cir. 2003); *Moser*, 294 F.3d at 340-41; *Moore*, 843 F.2d at 710; *see also McKibben v. Chubb*, 840 F.2d 1525 (10th Cir. 1988). This is a key point of *Sutton*, in which, as noted, the Court applied the Probate Exception to protect the exclusive jurisdiction of the Texas probate court to resolve issues of undue influence.

Moreover, as this Court has explained, an "action or suit *inter partes*" refers "only to independent controversies *inter partes*, and not to mere controversies which may arise on an application to probate a will because the state law provides for notice, or to disputes concerning the setting aside of a probate, when the remedy to set aside afforded by the state law is a mere continuation of the probate proceeding." *Farrell*, 199 U.S. at 110; *see id.* at 114-16 (where a proceeding to contest a will

under state law can only be heard before the court that admitted the will to probate, and where the relief in that proceeding operates as against the entire world and not just the parties before the court, it is not an action *inter partes*); *Sutton*, 246 U.S. at 207-08; *Waterman v. Canal-Louisiana Bank & Trust Co.*, 215 U.S. 33, 44 (1909) (no federal jurisdiction where the proceedings are *in rem* and are thus purely probate in character). Under Texas law, Vickie's suit is an integral component, and mere "continuation," of the Probate Case and not an independent *inter partes* suit. *See Sutton*, 246 U.S. at 205-06 (analyzing Texas probate law); *Farrell*, 199 U.S. at 111-14 (analyzing Washington probate law).

Vickie contends that the Probate Exception does not apply because her Claim involves an alleged *inter vivos* gift in the form of a trust that was supposed to have been created for her benefit, and that the Exception does not apply to gifts. Pet. App. 25-26. As the decision below correctly recognized, however, Vickie "cannot avoid the Probate Exception simply by stating that the trust which she claims was to be created [as a gift] for her benefit was an *inter vivos* trust." Pet. App. 33. As noted, Vickie did not actually receive her alleged gift before J. Howard died, and thus, under Texas law, her Claim fell within the exclusive jurisdiction of the Probate Court to determine all such claims involving J. Howard's property.

Finally, Vickie criticizes the decision below on the theory that the Ninth Circuit's decision "creat[es] a jurisdictional exception that has no statutory foundation" and constitutes an "extravagant extension." Pet. 22. On the contrary, the decision below correctly applies longstanding principles designed to preserve the integrity of probate proceedings within our federal system. This Court has long adhered to doctrines of federalism such as the Probate Exception, and the fact that they have not been codified by Congress does not mean that they are invalid. For example, this Court has long applied the similar Domestic Relations Exception, which proscribes federal court interference

in matters involving divorce, alimony, custody, and child support:

> One of the principal areas in which this Court has customarily declined to intervene is the realm of domestic relations. Long ago we observed that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." So strong is our deference to state law in this area that we have recognized a "domestic relations exception" that "divests the federal courts of power to issue divorce, alimony, and child custody decrees."

Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 124 S. Ct. 2301, 2309 (2004) (citations omitted). Vickie's criticisms are thus misplaced and the Probate Exception applies.

B. The Decision Below Does Not Conflict With The Decisions Of Other Courts Of Appeals.

Vickie asserts that "the circuit courts have become profoundly split over the scope of the probate exception." Pet. 12. Review of the relevant decisions, however, demonstrates that this is not so.

First, Vickie's reliance on *Goerg v. Parungao (In re Goerg)*, 844 F.2d 1562 (11th Cir. 1988), in support of her contention that the decision below creates a circuit conflict concerning the applicability of the Probate Exception in bankruptcy is plainly misplaced. In *Goerg*, the Eleventh Circuit considered whether the foreign administrator of a foreign decedent's German estate could petition for relief under section 304 of the Bankruptcy Code, which does not authorize the commencement of a bankruptcy case but merely permits certain foreign representatives to initiate proceedings in the United States to exercise control over property owned by a foreign entity. The administrator in *Goerg* commenced such a

proceeding to take possession of property of the foreign decedent's United States estate. In contrast to the instant case, *Goerg* did ***not*** involve a conflict between federal law and any state probate procedures, nor any effort by a bankruptcy court to adjudicate matters subject to a probate court's exclusive jurisdiction. The Probate Exception was never at issue and the case was resolved on other grounds. The Ninth Circuit correctly recognizes that *Goerg* is inapposite and that the statement in *Goerg* regarding the Probate Exception is pure *dicta*. Pet. App. 25-26.

Second, the Ninth Circuit did not "reject" any of Vickie's cited cases in relying on the Second Circuit's analysis in *Moser*. The Ninth Circuit relied on *Moser* because of its analytical fidelity to *Markham*, in contrast to "[o]ther circuits [that] have considered the probate exception but justify their decisions without strict adherence to the doctrine as enunciated by the Supreme Court in *Markham*." Pet. App. 27 n.11. Vickie's classification of cases according to how closely (in her estimation) they follow *Markham* does not demonstrate an actual conflict but merely reveals that the analyses in the decisions are not identical. If circuit conflicts were determined in the manner that Vickie suggests, there would be a conflict on virtually every issue decided by the courts of appeals. Demonstration of an actual conflict requires more, such as specific analysis showing that the result in this case would be different under the decisions that Vickie cites.

Vickie also fails to analyze the cited decisions for their application of the factors that courts consider in determining whether the Probate Exception applies in the specific contexts of the different types of probate systems that exist from state to state. Obviously, this will vary considerably from one case to another, depending on the probate law of the state in question and the facts and claims at issue. This variability hardly means that there is "chaos" requiring this Court's intervention, as Vickie contends. It merely reflects the diversity of claims and

systems that courts must address in applying the Probate Exception.

For example, in *Golden v. Golden*, 382 F.3d 348 (3d Cir. 2004), the Third Circuit dismissed under the Probate Exception certain of the plaintiff's causes of action because hearing them in federal court would interfere with probate jurisdiction (e.g., claims for fraud and undue influence), but allowed others to proceed (e.g., claims for slander and interference with inheritance rights). The Third Circuit expressly stated that differences in the applicable state law accounted for the difference between the result in *Golden* and the results reached previously by the court in *Moore v. Graybeal*, 843 F.2d 706 (3d Cir. 1988), and by the Seventh Circuit in *Storm v. Storm*, 328 F.3d 941 (7th Cir. 2003). *See Golden*, 382 F.3d at 365-66 & n.18. Among other differences, Pennsylvania law recognizes a specific cause of action for interference with inheritance rights -- the claim at issue in *Golden* -- and treats it in a certain way within its legal system. In contrast, no Texas court has ever recognized a cause of action for tortious interference with an expectancy of a gift -- the claim that Vickie asserts -- and Texas law treats all claims involving expectations of property in its own unique way.

Similarly, the decision below does not conflict with *Mangieri v. Mangieri*, 226 F.3d 1 (1st Cir. 2000), in which the son of a decedent who was not included in the decedent's probated will sued the executor under the state omitted-child statute and for breach of fiduciary duty. Citing *Markham* and other circuit authority, the First Circuit held that the district court correctly dismissed the case, as it was properly within the probate court's jurisdiction and the relief requested would have required that the probate court's ruling that the son was intentionally omitted from the will be set aside. *Mangieri*, 226 F.3d at 3. Nor does the decision below conflict with *Breaux v. Dilsaver*, 254 F.3d 533 (5th Cir. 2001). As the Ninth Circuit recognized, the facts of *Breaux* differ materially from the instant case in that *Breaux* did not involve a determination of the

plaintiff's interests in the decedent's assets but rather a suit against an administrator for improperly handled funds. Pet. App. 31.

The decision also comports with *Lepard v. NBD Bank*, 384 F.3d 232 (6th Cir. 2004). *Lepard* upheld the trial court's ruling that the plaintiff's breach of fiduciary duty claim fell "squarely within the exclusive jurisdiction of the Michigan probate courts" and, therefore, was barred by the Probate Exception. 384 F.3d at 237-38. *Lepard* also affirmed the trial court's determination that claims for theft, abuse of power, and undue influence were barred because "[t]he probate exception applies both to purely probate matters, and to matters ancillary to probate in the practical sense that allowing the case to be maintained in federal court would impair the policies served by the probate exception" and these counts are "connected inextricably with the probate of the estates and other issues ancillary to probate." *Id.* (internal quotation marks, alterations, and citation omitted).

Nor is there any conflict between the decision below and *Storm v. Storm*, 328 F.3d 941 (7th Cir. 2003), a case virtually indistinguishable from this one. Indeed, the Ninth Circuit acknowledged that the facts of *Storm* were similar and followed *Storm* (and other cases) in focusing on the substance of Vickie's claim, rather than the label that Vickie attaches to it. Pet. App. 32. Like the decision below, *Storm* held that plaintiff's claim for interference with an expectancy of inheritance was "'in substance and effect' a will contest" under applicable state law and, therefore, an ancillary probate proceeding subject to the probate exception. 328 F.3d at 944-45.

McKibben v. Chubb, 840 F.2d 1525 (10th Cir. 1988), also provides no support for Vickie's claim of a circuit split. Among other things, *McKibben* affirmed the dismissal of claims of undue influence and fraud in connection with the execution of a will as claims that properly belonged in the probate court, holding that the adjudication of such claims would interfere with

the probate court's jurisdiction. 840 F.2d at 1529-30. *McKibben* also dismissed fraud claims involving a pre-death transfer of non-probate estate property on the ground that there was no fraud if the plaintiff did not have a legitimate prospective inheritance. *Id.* at 1531.

Finally, the decision below does not conflict with the Eighth Circuit's decision in *Sianis v. Jensen*, 294 F.3d 994 (8th Cir. 2002), to allow a challenge to an *inter vivos* trust to proceed in federal court, as *Sianis* is distinguishable from the instant case in several critical respects. First, as the Eighth Circuit concluded, "the district court's adjudication of the validity of the Trust under Nebraska law will not interfere with the prior probate proceeding." 294 F.3d at 999. In *Sianis*, the probate court asserted no jurisdiction over the trust's *res* or its administration during the pendency of the probate proceeding. *Id.* Moreover, no Nebraska authority suggested that plaintiff could have challenged the trust's validity in the probate case. *Id.* Under these circumstances, the Eighth Circuit concluded that plaintiff's claim that the defendants wrongfully induced the decedent into executing the trust instrument did not trigger the Probate Exception. *Id.*

In sum, the decision below does not conflict with the cases that Vickie cites and Vickie provides no basis from which to conclude that the result in this case would be different under these decisions.

C. Vickie's Claim Is Barred In Any Event.

Although the Ninth Circuit did not address Pierce's arguments on these points, Vickie's Claim is also barred by the doctrines of *res judicata* and collateral estoppel,. Because Vickie's Claim is obviously barred, irrespective of the scope and application of the Probate Exception, the result in this case must be the same, making it an inappropriate vehicle for certiorari review.

The doctrines of *res judicata* and collateral estoppel, applicable through 28 U.S.C. § 1738, protect the finality of prior judgments and judicial determinations. There can be no clearer illustration of the reasons for these doctrines than this case. As this Court has very recently explained:

> 28 U.S.C. § 1738 requires federal courts to give preclusive effect to any state-court judgment that would have preclusive effect under the laws of the State in which the judgment was rendered. . . . This statute has long been understood to encompass the doctrines of res *judicata*, or "claim preclusion," and collateral estoppel, or "issue preclusion." *See Allen v. McCurry*, 449 U.S. 90, 94-96 (1980).
>
> . . . .
>
> The general rule implemented by the full faith and credit statute -- that parties should not be permitted to relitigate issues that have been resolved by courts of competent jurisdiction -- predates the Republic. It "has found its way into every system of jurisprudence, not only from its obvious fitness and propriety, but because without it, an end could never be put to litigation." *Hopkins v. Lee*, 6 Wheat. 109 (1821).

San Remo Hotel, L.P. v. City & County of San Francisco, 125 S. Ct. 2491, 2499-500, 2501 (2005) (footnote omitted). Any Texas court would dismiss Vickie's Claim and, therefore, the lower courts were required to do the same in this case. *E.g.*, *Harrold*, 93 F. Supp. at 888-89 (applying Texas law in probate matter).

CONCLUSION

For the foregoing reasons, the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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No. 04-1544

In The Supreme Court of the United States

VICKIE LYNN MARSHALL,

Petitioner,

v.

E. PIERCE MARSHALL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

> "'It is of first importance to have a definition so clear cut that it will not invite extensive threshold litigation over jurisdiction.' . . . *Jurisdiction should be as self-regulated as breathing.*"[1]

Determining the threshold issue of the probate exception is not "as self-regulated as breathing." Anything but – both commentators and courts have repeatedly lamented the irreconcilable lack of uniformity in the probate exception jurisprudence. Pet. 1-2; *see also* David P. Currie, *The Federal Courts and the American Law Institute, Part II*, 36 U. Chi. L. Rev. 268, 319 (1969) (by 1965, probate exception cases were already so confused that the American Law Institute voted unanimously to abandon a restatement because "the Institute's members were unable to agree on the definition of the excluded subjects – not surprisingly, in view of the amorphous state of the law").

The lack of uniformity is evident from even a brief survey of probate exception opinions. Pet. 12-20. It is also evidenced by another pending certiorari petition, *Snavely v. Miller*, No. 05-8, that raises the same issues presented here: the scope of the probate exception as applied to federal bankruptcy jurisdiction. It is a testament to the confusion over the probate exception that this Court should simultaneously entertain two petitions from the same circuit that arise from nearly identical cases but reach opposite conclusions.

The Brief In Opposition by respondent E. Pierce Marshall ("Pierce") does not seriously attempt to demonstrate

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[1] David P. Currie, *The Federal Courts and the American Law Institute, Part I*, 36 U. Chi. L. Rev. 1, 1 (1968-69).

that this profound split does not exist. Instead, Pierce simply asserts that a version of the probate exception applied by several circuits is the law of the land, and he demonstrates that the opinion below does not conflict with decisions of *those circuits*. In so doing, Pierce asserts that courts uniformly determine the scope of the probate exception with reference to state law, and thus that federal jurisdiction expands or contracts depending on the peculiarities of a state's probate system. This is patently wrong: This Court repeatedly has rejected the notion that federal jurisdiction over probate-related matters depends on state law, and many circuits define the probate exception in terms utterly independent of state law. Pierce simply ignores those authorities which, if applied here, unquestionably would have compelled a different result. Nor does he grapple seriously with the significant split of authority over whether the probate exception applies at all in federal question or bankruptcy cases.

Because he cannot demonstrate uniform application of the probate exception, Pierce instead devotes nearly half his brief to manipulating the record to cast petitioner Vickie Lynn Marshall ("Vickie") in a bad light. Most of his factual distortions, *see* App. 39-146, are irrelevant to the issues before the Court, and we do not address them. One point bears mention, however. Pierce repeatedly insinuates that Vickie forum-shopped because she asserted the same claim in two courts. That manifestly was not her purpose. Vickie's tort claim against Pierce in the bankruptcy court was a mandatory counterclaim to his adversary action against her. App. 42-43. She filed the same claim in Texas years later only after Pierce objected to the federal court's jurisdiction and the limitations period had nearly run. *Marshall v. Marshall (In re Marshall)*, 273 B.R. 822, 825-26 (Bankr. C.D.

Cal. 2002); ER 959, 1056. That it was necessary for Vickie to assert the same claim in two forums only underscores the confused state of the law and need for clarification. This case presents the issue in pristine form and is an ideal vehicle for certiorari review.

I. THE NINTH CIRCUIT'S ANALYSIS CONFLICTS WITH THIS COURT'S PROBATE EXCEPTION JURISPRUDENCE.

A central thesis of Pierce's opposition is that this Court's prior decisions uniformly hold there is no federal jurisdiction over any matter that, *under state law*, is in the exclusive jurisdiction of a state probate court. Opp. 14, 18-20. Not so. While two opinions of the Court arguably suggest that federal jurisdiction over probate-related matters depends to some degree on state law, *Sutton v. English*, 246 U.S. 199 (1918); *Farrell v. O'Brien*, 199 U.S. 89 (1905),[2] the weight of the Court's authority holds that state probate law cannot impair federal jurisdiction. *See, e.g., Waterman v. Canal-Louisiana Bank & Trust Co.*, 215 U.S. 33, 43 (1909) ("[federal] jurisdiction may be exercised, and is not subject to limitations or restraint by state legislation establishing courts of probate and giving them jurisdiction over similar matters"); *Hayes v. Pratt*, 147 U.S. 557, 570 (1893) (state probate statutes cannot "defeat or impair the general equity jurisdiction of the Circuit Court of the United States to

[2] Even *Sutton* and *Farrell* do not utilize state law in the way Pierce suggests. They hold that states can *expand* federal jurisdiction by permitting *inter partes* actions "to annul a will or to set aside the probate," but they do not suggest that states can *contract* federal jurisdiction by expanding the traditional scope of probate proceedings. *Sutton*, 246 U.S. at 205; *Farrell*, 199 U.S. at 110-12; *see Golden v. Golden*, 382 F.3d 348, 358-60 (3d Cir. 2004).

administer . . . the assets of a deceased person within its jurisdiction"); *Green's Adm'x v. Creighton*, 64 U.S. 90, 107-08 (1860) ("a foreign creditor may establish his debt in the courts of the United States against the representatives of a decedent, notwithstanding the local laws relative to the administration and settlement of insolvent estates"). Although the Petition cites these cases, Pierce does not address them or the principle they articulate.

This Court's opinions also undermine Pierce's claim that the probate exception "exists precisely to" avoid concurrent federal-state jurisdiction over probate-related matters. Opp. 2. The probate exception emanates from the Judiciary Act of 1789 – it is not a doctrine of comity. Pet. 9-10. Moreover, this Court's cases consistently hold that the probate exception does *not* preclude concurrent federal-state jurisdiction over claims to a decedent's assets; instead, the probate exception is invoked only where a federal court probates a will or "'*disturb[s] the possession of . . . property* by the state court.'" *Waterman*, 215 U.S. at 44 (citations omitted, emphasis added); *and see* Pet. 7-12. This Court's cases also clearly hold there is federal jurisdiction to adjudicate "a debt against the estate," *Waterman*, 215 U.S. at 44, or "the validity or construction of a will," *Gaines v. Fuentes*, 92 U.S. 10, 22 (1876); *see also Payne v. Hook*, 74 U.S. 425 (1868) (probate exception did not bar plaintiff's suit to obtain her intestate share of her brother's estate); *McClellan v. Carland*, 217 U.S. 268, 275-76 (1910) (probate exception did not bar plaintiffs' claim to be "the sole heirs at law and next of kin of said decedent, and entitled to inherit the estate, real and personal").[3]

[3] These cases fatally undermine Pierce's claim that there is no federal jurisdiction here because "Vickie's claim is not *inter partes*." Opp. 23. Pierce contends claims are *in rem*, and thus are barred by the

(Continued on following page)

Markham v. Allen, 326 U.S. 490 (1946) comports with this analysis – not with Pierce's thesis that state law determines the probate exception's scope. *Markham* holds that federal courts cannot "interfere with the probate proceedings," *id.* at 494, but it in no way suggests that "interference" depends on state law. Rather, under *Markham*, federal courts "interfer[e] with . . . probate" only if they "disturb or affect the *possession of property* in the custody of a state court." *Id.* at 494 (emphasis added). There is *no* such improper interference, *Markham* holds, where a federal court merely "adjudicate[s] rights in" a decedent's property, even if that adjudication will bind a probate court. *Id.*

II. THE COURTS ARE IRRECONCILABLY IN CONFLICT OVER THE REACH OF THE PROBATE EXCEPTION.

Pierce is simply wrong that the Ninth Circuit's reliance on state law is consistent with the jurisprudence of every other circuit. While some circuits hold that the probate exception depends on state law,[4] three circuits (the Fifth and Eleventh, plus many panels of the Second) – circuits that Pierce almost entirely ignores, *see* Opp. 27-29 – manifestly do not. Pet. 12-18.[5] In these circuits, the probate

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probate exception, if they have any effect on the distribution of estate assets. Not so: This Court repeatedly has held there is federal jurisdiction over probate-related claims unless a federal court purports to make orders directly against an estate *res*. Pet. 7-12.

[4] Even circuits that consider state law in determining the scope of the probate exception are split on how to do so. *See* Pet. 14-18.

[5] The Seventh Circuit applies an entirely different test, but one that also is independent of state law. There, the probate exception bars suits that if "'maintained in federal court would impair the policies

(Continued on following page)

exception applies, *without regard to state law*, only if a federal court probates a will or directly distributes estate assets. Pet. 12-14. It expressly does *not* apply if a court merely issues "a decree between the parties," *Robertson v. Robertson*, 803 F.2d 136, 139 (5th Cir. 1986), even if the decree adjudicates a party's "'right to share in the estate,'" *Dulce v. Dulce*, 233 F.3d 143, 148 (2d Cir. 2000); *see also Michigan Tech Fund v. Century Nat'l Bank*, 680 F.2d 736, 739-41 (11th Cir. 1982) (probate exception does not foreclose federal court from interpreting a will or adjudicating a claim for breach of agreement to make a will); *Ashton v. Josephine Bay Paul and C. Michael Paul Foundation, Inc.*, 918 F.2d 1065, 1072 (2d Cir. 1990) ("Merely determining the rights to, as opposed to administering, assets is not proscribed by the probate exception."); *Turton v. Turton*, 644 F.2d 344, 347 (5th Cir. 1981) (federal court may "declar[e] the validity of the asserted claims, leaving the claimants to assert their federal judgments as *res judicata* in the probate court.").[6]

Thus, Pierce is plainly wrong "that the result in this case would [not] be different" in other circuits, or that any variation in result is fully explained by the vagaries of state law. Opp. 29. Had Vickie's suit arisen in the Second, Fifth or Eleventh Circuit, it would not have been barred by

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served by the [probate exception].'" Pet. 16-17, quoting *Storm v. Storm*, 328 F.3d 941, 943-44 (7th Cir. 2003).

[6] Because Texas probate law is irrelevant to whether certiorari should be granted, we do not discuss it except to note that the Opposition fundamentally mischaracterizes the scope of exclusive Texas probate court jurisdiction. As the district court held, under Texas law the probate court lacked exclusive jurisdiction over Vickie's claim. App. 165-70. The Texas probate court agreed: When Pierce asked the Texas court to enjoin Vickie from proceeding in the bankruptcy court, the court declined to do so, stating, "I think [the bankruptcy judge] can order a judgment for money damages [against Pierce]." SER 12291.

the probate exception because it was against Pierce individually, not Howard's probate estate or testamentary trust. App. 152, 162-63. And, even if her claim were not against Pierce personally, at most it sought a judgment adjudicating her "'right to share in the estate,'" *Dulce*, 233 F.3d at 148[7] – a judgment the Second, Fifth and Eleventh Circuits repeatedly have held would not invoke the probate exception. Pet. 12-14; *see also DeWitt v. Duce*, 599 F.2d 676, 677 (5th Cir. 1979) (tortious interference claim not barred by the probate exception); *Glickstein v. Sun Bank/Miami*, 922 F.2d 666, 668 n.2, 672-74 (11th Cir. 1991) (same); *and see Michigan Tech*, 680 F.2d at 739-41 (breach of agreement to make a will not barred by the probate exception).[8]

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[7] Pierce's repeated suggestion that the district court "invalid[ated]" Howard's will and trust, Opp. 1, 2, is patently false. While the district court made findings about Howard's intended distribution of his assets – specifically, whether Howard intended to gift some of his vast wealth to Vickie during his life – those findings were relevant only to the damages award entered for Vickie and against Pierce. The district court did *not* strike down Howard's testamentary documents themselves, nor did Vickie ask it to. App. 162-63. Pierce's misstatement is superficially appealing only because both the probate and federal courts necessarily considered to some degree what Howard intended to do with his assets. But while that overlap may raise *res judicata* concerns, those concerns are not jurisdictional.

[8] This result is consistent with this Court's analysis of the "domestic relations exception," which Pierce suggests is analogous to the probate exception. Opp. 24-25. In *Ankenbrandt v. Richards*, 504 U.S. 689 (1992), the Court held that the domestic relations exception bars federal jurisdiction over "the issuance of a divorce, alimony, or child custody decree," but it does *not* preclude jurisdiction over a tort action between divorced parents. *Id.* at 669, 703-04. That was so, the Court held, even though the federal claims of physical and sexual abuse overlapped in significant ways with a state suit seeking termination of the father's parental rights. *Id.* at 691 n.1, 704.

III. THE COURTS ARE IN CONFLICT OVER WHETHER THE PROBATE EXCEPTION APPLIES TO FEDERAL QUESTION CASES.

Contrary to Pierce's suggestion, this Court has never held that the probate exception applies to federal question cases generally, or bankruptcy cases specifically. *Harris v. Zion Sav. Bank & Trust Co.*, 317 U.S. 447 (1943) – which Pierce says "applied the Probate Exception to overturn a bankruptcy court's assertion of bankruptcy jurisdiction under an express statutory grant," Opp. 21 – is not a probate exception case at all. Rather, the Court reached only a narrow question of statutory interpretation. Pet. 19 n.6.

Pierce is also wrong that the Ninth Circuit's application of the probate exception to bankruptcy is consistent with other circuits. The Eleventh Circuit expressly held that the probate exception is limited to diversity cases in *Glickstein v. Sun Bank/Miami*, 922 F.2d 666 (11th Cir. 1991) – a case that, although discussed in the Petition, Pierce does not address. Pierce does try to explain away the holding in *Goerg v. Parungao (In re Goerg)*, 844 F.2d 1562 (11th Cir. 1988) as "pure dicta." Opp. 26. It is not: *Goerg* held that a federal court properly exercised jurisdiction over the property of an insolvent foreign decedent – a conclusion it could not have reached if the probate exception ousted federal jurisdiction. Pet. 20 n.7; *see also* Pet. 20 n.8 (noting district court split over whether the probate exception applies outside diversity cases).

It is critical that this Court resolve the circuit conflict over whether the probate exception applies to federal question cases generally, and bankruptcy cases specifically. Until the Ninth Circuit's opinion here, 150 years of probate exception cases yielded no decision holding that the probate exception might oust plenary federal jurisdiction over

bankruptcy. In the seven months since the Ninth Circuit's opinion, however, another court applied the probate exception in bankruptcy, *Litzinger v. Estate of Litzinger* (*In re Litzinger*), 322 B.R. 108 (B.A.P. 8th Cir. 2005), and another declined to do so, resulting in a now-pending certiorari petition, *Snavely v. Miller*, No. 05-8. If the decision below stands, the Court will inevitably see many more cases where bankruptcy jurisdiction is declined pursuant to the probate exception.

IV. VICKIE'S CLAIM IS NOT BARRED BY *RES JUDICATA* OR COLLATERAL ESTOPPEL.

Pierce argues that this case is an inappropriate vehicle for certiorari review because "Vickie's Claim is also barred by the doctrines of *res judicata* and collateral estoppel." Opp. 29. That a judgment may be subject to reversal on grounds *independent* of those raised in a certiorari petition is no basis for denying certiorari. *See, e.g.*, *Exxon Mobil Corp. v. Saudi Basic Indust. Corp.*, 125 S. Ct. 1517, 1527 (2005) (reaching jurisdictional question posed in *Rooker-Feldman* case, even though the "[d]isposition of the federal action, once the state-court adjudication is complete, would be governed by preclusion law").

In any event, Vickie's federal claim is not barred by the Texas judgment. When two actions are pending concurrently, preclusion attaches to the first final judgment. 18 Charles Alan Wright et al., *Federal Practice and Procedure*, § 4404 (2d ed. 2002). Here, the bankruptcy court entered judgment nearly a year before the Texas probate judgment. App. 17, 19. Moreover, Vickie did not actually litigate her tortious interference claim to judgment in

Texas; once she obtained judgment in the bankruptcy court, she immediately dismissed her claims in Texas. *Marshall*, 273 B.R. at 826. Finally, Vickie's tortious interference claim was not actually tried in Texas: Consistent with Pierce's repeated representations to the bankruptcy court that the tortious interference claim was *not* at issue in the probate proceedings, the only question the Texas jury considered concerning Vickie was whether Howard breached an *agreement* to leave her half his property – a finding irrelevant to Vickie's tortious interference claim. *Id.* at 826, 831-32. Thus, the district court properly held that the Texas judgment did not preclude Vickie's federal claims, *Marshall v. Marshall (In re Marshall)*, 271 B.R. 858, 862-67 (C.D. Cal. 2001); ER 5389, a conclusion the Ninth Circuit never reviewed.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that this Court grant the petition for writ of certiorari.

Respectfully submitted,

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No. 04-1544

Supreme Court, U.S.
FILED
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In The Supreme Court of the United States

VICKIE LYNN MARSHALL,

Petitioner,

v.

E. PIERCE MARSHALL,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

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DOCKET OF RELEVANT DOCUMENTS

ORIGINAL FILING DATE	USDC DOCKET NO.	USDC FILING DATE	DOCUMENT TITLE	NINTH CIRCUIT EXCERPTS NO.
04/03/95[1]			Petition for Declaratory Judgment and Motion for Trust Disclosure and for Accounting of Income Earned, originally filed in case no. 272,890, Guardianship of J. Howard Marshall, II, probate court number three, Harris County, Texas by Vickie Lynn Marshall	ER 5614
08/08/95	282[2]	11/02/01	Application for Letters of Administration, originally filed in case no. 276,815, In re Estate of J. Howard Marshall, II, deceased, probate court number three, Harris County, Texas by Vickie Lynn Marshall	ER 816

[1] Some of the documents identified in this docket were originally filed in probate or guardianship proceedings in Texas state court or in the underlying adversary proceeding in the bankruptcy court. Accordingly, we have organized this docket by the original filing date of each document. For the Court's convenience, we have also identified the dates on which documents were filed in the district court and where the documents can be found in the Excerpts of Record ("ER") and Supplemental Excerpts of Record ("SER") filed in the Ninth Circuit.

[2] The entire district court is docket included in the Supplemental Excerpts of Record at pp. 12533-84.

08/14/95	56	04/09/01	Opposition to Application for Letters of Administration, originally filed in case no. 276,815-402, In re Estate of J. Howard Marshall, II, deceased, probate court number three, Harris County, Texas	ER 842
08/16/95	211	07/17/01	Application for Probate of Will and Codicil and for Appointment of Independent Co-Executors, originally filed in case no. 276,815-402, In re Estate of J. Howard Marshall, II, deceased, probate court number three, Harris County, Texas by E. Pierce Marshall	ER 836
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01/25/96	98	06/15/01	Chapter 11 Voluntary Petition for Vickie Lynn Marshall originally filed in U.S.B.C., case no. LA 96-12510	SER 5987
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06/14/96	123	06/15/01	Answer and Counterclaim By Vickie Lynn Marshall Against E. Pierce Marshall, originally filed in U.S.B.C. adversary no. 96-01838	SER 6727
07/08/96	123	06/15/01	Answer and Affirmative Defenses of E. Pierce Marshall to Counterclaim by Vickie Lynn Marshall, originally filed in U.S.B.C. adversary no. 96-01838	SER 6753
01/23/98	281	11/2/01	Amended and Consolidated Petition and Will Contest, originally filed in case no. 276,815-402, In re Estate of J. Howard Marshall, II, deceased, probate court number three, Harris County, Texas by Vickie Lynn Marshall	ER 1319

12/29/98	98	06/15/01	Debtor's First Amended Plan of Reorganization, originally filed in U.S.B.C., case no. LA 96-12510	SER 6065
03/08/99	98	06/15/01	Order Confirming Debtor's First Amended Plan of Reorganization, entered in U.S.B.C., case no. LA 96-12510	SER 6086
03/25/99	98	06/15/01	Discharge of Debtor [Vickie Lynn Marshall], entered in U.S.B.C., case no. LA 96-12510	SER 6090
10/22/99	150	06/15/01	Order Denying Motion Regarding Absence of Subject Matter Jurisdiction, entered in U.S.B.C., adversary no. 96-01838	SER 7510
11/5/99	161	06/15/01	Order Granting Summary Judgment, entered in U.S.B.C., adversary no. 96-01838	SER 7940
11/8/99	161	06/15/01	Judgment for Debtor/ Defendant, entered in U.S.B.C., adversary no. 96-01838	SER 8086
1/4/00	211	07/17/01	Plaintiff Vickie Lynn Marshall's Third Amended Consolidated Petition and Will Contest, originally filed in case no. 276,815-402, In re Estate of J. Howard Marshall, II, deceased, probate court number two, Harris County, Texas	ER 2838

9/–/00	283	07/17/01	Plaintiff Vickie Marshall's Preliminary Jury Questions and Instructions, originally filed in case no. 276,815-402, In re Estate of J. Howard Marshall, II, deceased, probate court number two, Harris County, Texas	ER 4073
10/2/00	283	11/2/01	Reporter's Record of Opening Statements in case no. 276,815-402, In re Estate of J. Howard Marshall, II, deceased, probate court number two, Harris County, Texas	ER 4105
10/6/00	169	06/15/01	Amended Memorandum of Decision Following Trial, entered in U.S.B.C. adversary no. 96-01838 [*In re Marshall*, 253 B.R. 550 (C.D. Bankr. October 6, 2000)]	ER 3047
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12/29/00	172	06/15/01	Order on Motion for Entry of Judgment, entered in U.S.B.C. adversary no. 96-01838 [*In re Marshall*, 257 B.R. 35 C.D. Bankr. (December 29, 2000)]	ER 3363

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08/11/03			Substituted Corrected Opening Brief of Appellant E. Pierce Marshall, filed in Ninth Circuit	
10/09/03			Transcript of Oral Arguments in the United States Court of Appeals for the Ninth Circuit, excerpts pp. 34-39, 63-64	
12/30/04			*In re Marshall*, 392 F.3d 1118 (9th Cir. December 30, 2004)	

NO. 272,890

GUARDIANSHIP OF	)(	IN THE PROBATE
	)(	COURT
J. HOWARD MARSHALL, II	)(	NUMBER THREE (3) OF
AN INCAPACITATED	)(	HARRIS COUNTY,
ADULT PERSON	)(	TEXAS

PETITION FOR DECLARATORY JUDGMENT
AND
MOTION FOR TRUST DISCLOSURE AND FOR ACCOUNTING OF INCOME EARNED

(April 1995)

TO THE HONORABLE JUDGE OF SAID COURT:

VICKI LYNN MARSHALL a/k/a ANNA NICOLE SMITH ("Movant") files this Petition for Declaratory Judgment and Motion for Trust Disclosure and for Accounting of Income Earned and would show the Court as follows:

I.

Movant is the lawful and legal wife of J. HOWARD MARSHALL II, is a resident of Harris County, and is represented by Counsel, SUZANNE P. KORNBLIT, JOHN HUTCHISON III, LENARD LEEDS and STEVEN A. MORELLI, who file this Motion in her behalf.

Movant complains of E. PIERCE MARSHALL ("Respondent") in his individual capacity, his capacity as Co-Trustee of the J. HOWARD MARSHALL II LIVING TRUST, in his purported capacity as agent for J. HOWARD MARSHALL II under Power of Attorney dated July

13, 1994 and in his capacity as Temporary Guardian of the Person of J. HOWARD MARSHALL II. Respondent resides at 5917 Club Oaks Drive, Dallas, Texas 75248 and may be served with citation there by certified mail. In addition, Respondent may be served through his attorney of record JOSEPH HORRIGAN, HORRIGAN & GOEHRS, 909 Fannin #1000, Houston, Texas 77010, pursuant to Section 34 of the Texas Probate Code.

II.

This Court has Jurisdiction over this proceeding pursuant to Sections 5(d) and 5A(c) of the Texas Probate Code, Sections 37.005, et seq., of the Texas Civil Practice and Remedies Code, and Section 115.001(d) of the Texas Trust Code.

III.

Venue of this cause is in Harris County pursuant to sections 15.001 and 15.031 of the Texas Civil Practice and Remedies Code, and Section 115.002(d) of the Texas Trust Code.

IV.

Movant would show that although she and her attorneys have made repeated requests for support for herself and for her husband to Respondent by and through his attorneys and has requested a copy of the J. HOWARD MARSHALL II LIVING TRUST, Respondent and his attorneys have refused to provide same, leaving Movant with no alternative but to seek judicial intervention on behalf of herself and her husband and herein requests this

Court compel Respondent to disclose the Trust instrument in order that the Court may judicially determine whether or not J. HOWARD MARSHALL II is indeed a beneficiary of such Trust and thereby entitled to have his and Movant's lawful debts and support paid from the Trust.

J. HOWARD MARSHALL II is currently ailing and recuperating from pneumonia; said condition precludes his direct intervention in this matter. The actions of Respondent as illustrated herein have been in conflict with his father's interests and evidence Respondent's intent to protect his own interests ahead of those of his father and of his father's lawful wife.

V.

On June 27, 1994 Movant married J. HOWARD MARSHALL, II in a formal wedding ceremony performed in Houston, Texas. Movant would show the Court that after Movant and J. HOWARD MARSHALL were married, Respondent commenced a course of conduct which continues even today and which has been designed to tortiously interfere with Movant's statutory property rights under Texas law entitling her to support from her husband during their marriage. Such course of conduct on the part of Respondent was done with malice and included the following actions:

1. On July 13, 1994 Respondent caused to be prepared and executed an Act of Procuration (copy attached as Exhibit 1) whereby J. HOWARD MARSHALL II gave Respondent a durable power of attorney, the right to make his health care decisions, and nominated Respondent as his Guardian. The designation of Guardian does not

comply with Texas law, Texas Probate Code Section 679.

2. On July 13, 1994 Respondent caused to be prepared and executed, an amendment to the J. HOWARD MARSHALL II LIVING TRUST. (see 1st sentence in the copy of a Deed attached as Exhibit 2)

3. On July 15, 1994 Respondent caused to be prepared and executed the Deed (previously mentioned as being attached as Exhibit 2) whereby J. HOWARD MARSHALL II became obligated to the J. HOWARD MARSHALL II LIVING, TRUST in the amount of $960,000.00. We surmise J. HOWARD MARSHALL II believed that this deed gave him personal title to the property he and Movant knew as "the ranch" and the right to "gift" the ranch to Movant.

4. On or about September 24, 1994, J. HOWARD MARSHALL II signed an Act of Donation with Acceptance attempting to gift to Movant a 1992 Mercedes, 1000 shares of stock in Compaigne Victoire Inc., a Texas Corporation, and the ranch.

Movant would show that if such Power of Attorney, Deed, Trust Amendment, and Act of Donation with Acceptance were executed by J. HOWARD MARSHALL II, the signature of J. HOWARD MARSHALL II was obtained through the actual or constructive fraud of Respondent or by virtue of undue influence exercised upon J. HOWARD MARSHALL II by the Respondent. Movant would further show that J. HOWARD MARSHALL II had promised Movant he would put the ranch in her name unencumbered, and that J. HOWARD MARSHALL II trusted Respondent who was in a confidential and fiduciary relationship with him as Co-Trustee of the J. HOWARD

MARSHALL II LIVING TRUST and co-owner, shareholder, director and officer of Marshall Petroleum Inc. which is purportedly the major asset in the J. HOWARD MARSHALL II LIVING TRUST. Movant would further show that at the time Respondent induced his father to obligate himself for $960,000.00 to purchase the ranch from the J. HOWARD MARSHALL II LIVING TRUST, Respondent as Co-Trustee of that trust had personal knowledge of the finances of J. HOWARD MARSHALL II, and intended to obstruct the wishes of J. HOWARD MARSHALL II to own his ranch unencumbered and in fee simple so that he could gift it to Movant.

5. On or about September 26, 1994, J. HOWARD MARSHALL II purchased jewelry as a gift for Movant and wrote a check to Harry Winston's. Respondent under the above mentioned Power Of Attorney, as Co-Trustee of the J. HOWARD MARSHALL II LIVING TRUST, and as Temporary Guardian of the Person of J. HOWARD MARSHALL II still as of this date, has failed to honor his father's check. Movant on good faith returned the jewelry to Harry Winston on or about March 7, 1995. However both she and J. HOWARD MARSHALL II have been sued by Harry Winston and are still liable for the purchase price, interest, and attorney fees.

Movant would show that during her courtship with J. HOWARD MARSHALL II and after their marriage, her husband gave generous gifts to Movant in accordance with his means while Movant gave him in return her devotion and affection. Their lifestyle together, both before and after their marriage was lavish, J. HOWARD MARSHALL II providing, and in fact insisting upon meeting Movant's every need and desire. Movant would further show that J.

HOWARD MARSHALL II relied on Respondent who was his Co-Trustee, had no reason to believe that he did not have sufficient assets to pay for the ranch, for the jewelry purchase, and for other necessities for himself and for his wife.

VI.

At or about the time Movant and J. HOWARD MARSHALL II received notice of insufficient funds regarding, the check J. HOWARD MARSHALL II had negotiated at Harry Winston's they also learned J. HOWARD MARSHALL II had no funds in the bank accounts he had been using.

In December of 1994 J. HOWARD MARSHALL II became ill and was hospitalized for pneumonia, his heart having been broken by the trickery and deceit of his son. Up until such time J. HOWARD MARSHALL II became ill in December of 1994 he attended his duties as Chief Operating Officer of Marshall Petroleum Inc. daily, with no thought that his bank accounts were depleted.

Respondent as Co-Trustee of the J. HOWARD MARSHALL II LIVING TRUST owes the highest fiduciary duties to J. HOWARD MARSHALL II, especially if, as has been suggested by attorneys representing J. HOWARD MARSHALL II and E. PIERCE MARSHALL, Respondent is the sole beneficiary of the J. HOWARD MARSHALL II LIVING TRUST upon the eventual death of J. HOWARD MARSHALL II. Respondent's conflict of interest is obvious. Respondent has breached the fiduciary duties owed to J. HOWARD MARSHALL II under the J. HOWARD MARSHALL II LIVING TRUST and Respondent as attorney in fact for J. HOWARD MARSHALL II has

caused J. HOWARD MARSHALL II to breach his statutory duty of support owed to his wife by, among others: failing to pay expenses of J. HOWARD MARSHALL II, failing to make income distributions to J. HOWARD MARSHAL II and to Movant, and failing to pay taxes, insurance and utilities on properties J. HOWARD MARSHALL II gifted to Movant before and during their marriage. As a result of such breach, J. HOWARD MARSHALL II and Movant who is entitled to a community share of income from the trust have been damaged.

VII.

Movant would show that J. HOWARD MARSHALL II represents himself to be a man of quite substantial means and was recognized by *Forbes* magazine as one of the wealthiest men in America. Since October, Respondent acting as both Co-Trustee of the J. HOWARD MARSHALL II LIVING TRUST and as agent of J. HOWARD MARSHALL II under the aforementioned Power of Attorney has seen fit to cut off support necessary to maintain marital bills and expenses of Movant and J. HOWARD MARSHALL II. Thus, one of the wealthiest men in America and his wife, have had the water turned off in residences for non-payment, and have received delinquent notices regarding taxes, insurance and various utilities. Respondent has informed Movant by and through his attorneys that there are no available funds for these bills and/or for Movant's expenses which J. HOWARD MARSHALL II had willingly and generously provided to Movant through their courtship and through the first months of their marriage. Movant believes J. HOWARD MARSHALL II would want to provide for her support, that their marriage is sound and that Respondent's selfish

withholding of the payment of their bills is a breach of his fiduciary duty under both the J. HOWARD MARSHALL II LIVING TRUST and the aforementioned Power of Attorney. Movant seeks disclosure of the J. HOWARD MARSHALL II LIVING TRUST in order that this Court may judicially determine its validity and the obligations of the trust to provide for the support of J. HOWARD MARSHALL II and Movant.

Texas Family Code Section 4.02 obligates each spouse to support the other spouse. It is well established Texas law, and practice that if no community funds are available, the spouse having separate funds is required to use them for community living expenses. Income received by a married beneficiary on the trust corpus to which the beneficiary is entitled is community property. *Mercantile Bank at Dallas v. Wilson,* 279 S.W. 2d 650, 654 (Tex.Civ.App. Dallas 1955, writ ref'd n.r.e.) Trust income which a married beneficiary does not receive, and to which he has no claim other than an expectancy interest in the corpus, is not community property. *Matter of the marriage of Long*, 542 S.W. 2d 712, 718 (Tex.Civ.App. – Texarkana 1976, no writ) Movant insists that she be given an opportunity through disclosure of the J. HOWARD MARSHALL II LIVING TRUST to ascertain whether or not J. HOWARD MARSHALL II is entitled to a possessory interest in the trust corpus whereby not only the income, but also the corpus of said trust is available for her and her husband's expenses.

VIII.

Because of Respondent's wrongful conduct as above alleged, Movant will show that Respondent has breached his

fiduciary duty he has to J. HOWARD MARSHALL II and to Movant who is the spouse of J. HOWARD MARSHALL II. Movant would show that Respondent's actions constitute material violations of the terms of the J. HOWARD MARSHALL II LIVING TRUST and which have resulted in material financial loss and expense to the trust, to the properties within the trust, to Movant and to J. HOWARD MARSHALL II. Such material breaches and violations by Respondent constitute grounds to require Respondent's removal as Trustee; Movant recognizing her own potential conflict, requests this Court Order the Power of Attorney be revoked and asks this Court to remove Respondent as Co-Trustee of the J. HOWARD MARSHALL II LIVING TRUST under authority of Section 113.082 of the Texas Trust Code and requests the appointment of an independent third Party to replace Respondent. Upon such removal, Respondent should be required to formally account for all property ever held by him as Co-Trustee of such trust and the Court should order the delivery of J. HOWARD MARSHALL II's assets in the J. HOWARD MARSHALL II LIVING TRUST to the Court so that the funds may be administered under Court supervision.

IX.

Movant demands Respondent see that the Harry Winston jewels are returned to her and paid for by the J. HOWARD MARSHALL II LIVING TRUST and/or that she be indemnified in the lawsuit on that matter. Movant demands Respondent provide maintenance and support for J. HOWARD MARSHALL II and for herself. Because under Texas community property law, Movant would be entitled to 1/2 of the earnings from the separate estate of her husband from their date of marriage, Movant seeks an

accounting and a judicial determination of the community amount she is entitled to receive and asks this Court to impose a constructive trust upon assets she is entitled to and to which Respondent has in his control.

In the alternative, a justiciable question exists as to the true ownership of the assets composing the J. HOWARD MARSHALL II LIVING TRUST and Movant requests that this Court enter a declaratory judgment determining rightful ownership of the assets in the J. HOWARD MARSHALL II LIVING TRUST.

X.

To the extent any of the aforementioned actions of Respondent constitute bad faith in the performance of his duties, breach of trust, gross neglect or self dealing, Movant requests that Respondent be personally surcharged for all losses and/or unreasonable expenses of the Trust, including but not limited to, attorneys' fees and trustees' fees from his neglect, self dealing and breach of trust, if any is so found by this Court. Respondent has breached his fiduciary duty by engaging in self dealing and by the manner in which he has managed the trust assets. Respondent's actions have been intentionally adverse to J. HOWARD MARSHALL II and have constituted wrongful self-dealing, bad faith, misappropriation of trust assets, and reckless indifference toward the interest of the beneficiary, all of which entitles Movant the requested surcharge for actual and exemplary damages.

XI.

Pursuant to Section 37.009 of the Texas Civil Practice and remedies Code, Movant requests the Court award her

costs of court and reasonable attorneys' fees for bringing this action. In a suit in which legal assistance is required to protect a spouse's marital rights, the spouse may collect attorney fees out of the community property or, if necessary, out of the other spouse's separate property. *Jindra v. Jindra*, 267 S.W. 2d 287 (Tex.Civ.App. – San Antonio 1954) *Swenson v. Swenson*, 45 S.W. 2d 424 428 (Tex.Civ.App. – Houston [1st Dist.] 1971, no writ) Additionally, Movant requests Respondent pay his proportionate share of fees and expenses and costs incurred in the trial court, court of appeals, or any appeal to the Texas Supreme Court.

WHEREFORE, PREMISES CONSIDERED, Movant requests that the Court enter judgment as follows:

(1) Enter an Order directing Respondent to disclose to Movant and to this court, the J. HOWARD MARSHALL II LIVING TRUST so that J. HOWARD MARSHALL II may be declared a beneficiary of the trust; and/or

(2) Enter an Order directing Respondent to pay reasonable and customary support to J. HOWARD MARSHALL II and to Movant, in the standard to which J. HOWARD MARSHALL II and Movant VICKIE LYNN MARSHALL a/k/a ANNA NICOLE SMITH have been accustomed; and/or

(3) After final trial, terminate the Power of Attorney and remove Respondent as Trustee of the Trust; and/or

(4) Enter an Order surcharging Respondent for the actual and exemplary damages sought herein and proven at final trial, including, but not limited to, all unreasonable trustee and attorneys' fees; and/or

(5) Tax Movant's fees as costs that were reasonable and necessary attorneys' fees and costs incurred in this case, from Respondent individually, plus fees and expenses for any appeal to the Court of Appeals and/or Supreme Court of Texas by any party; and/or

(6) Grant Movant such other and further relief, both general and special, at law and in equity, to which she may show herself justly entitled.

Respectfully Submitted,

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UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

In re VICKIE LYNN MARSHALL, Debtor.	) CASE NO. LA 96-12510-SB)) Chapter 11)) Adversary No. 96-01838 SB
E. Pierce Marshall, Plaintiff, v. Vickie Lynn Marshall, Defendant.	) ANSWER AND COUNTER-) CLAIM BY VICKIE LYNN) MARSHALL AGAINST E.) PIERCE MARSHALL UNDER) 11 U.S.C. §§544, 550, AND) APPLICABLE LAW)) (Filed June 14, 1996)
Vickie Lynn Marshall, Counterclaimant, v. E. Pierce Marshall, Counterdefendant.	) STATUS CONFERENCE) DATE: July 10, 1996) TIME: 10:00 a.m.) CTRM: 1575) Roybal Federal Building) 255 East Temple Street) Los Angeles, CA 90012

* * *

FOURTH COUNTERCLAIM

(Tortious Interference With Inheritance)

35. Mrs. Marshall incorporates by reference paragraphs 1 through 25, as though fully set forth.

36. By the promises made to Mrs. Marshall, by the intentions expressed by Mr. Marshall, it is clear that Mrs. Marshall had expectancies of inheritance and/or gift that were realistic and substantial.

37. Debtor is informed and believes that Counterdefendant intentionally interfered with that expectancy by engaging in a concerted campaign to undermine Mrs. Marshall's rights and Mrs. Marshall's marriage to her Husband, by effectively imprisoning Mr. Marshall against his wishes, by surrounding Mr. Marshall with hired agents who reported to the Younger Son, by stationing armed guards to prevent access and personal contact between the Husband and Wife, by cutting off support and obstructing the expressed wishes of Mr. Marshall, by deceiving Mr. Marshall, by attempting to undo gifts made by Mr. Marshall, by preparing documents and by ostensibly making transfers of property of Mr. Marshall which were inconsistent with his expressed wishes and desires, by making misrepresentations against Mrs. Marshall, by cutting off income to Mr. and Mrs. Marshall, by cutting off payments to professionals retained to assist Mrs. Marshall, by suborning false testimony against Mrs. Marshall, by abusing legal process, and by other actions that shall be proven at trial. Mrs. Marshall is informed and believes such interference was tortious, and marked by fraud, duress and undue influence.

38. As a proximate result of such interference, Debtor has been damaged in an amount to be proven at trial but which amount Debtor believes exceeds $300 million.

39. Mrs. Marshall is informed and believes that at all pertinent times the Counterdefendant has acted toward her in an outrageous, despicable, and vindictive manner, with personal hatred, malice and ill-will, in conscious disregard of Mrs. Marshall's rights, with an intentional purpose to injure, vex and annoy her, all for the Younger Son's financial gain, such that the Counterdefendant should pay

punitive damages in an amount and of a magnitude similar to or greater than the financial gain seized by him.

* * *

NO. 276,815-402

IN RE ESTATE OF J. HOWARD MARSHALL, II DECEASED	§	IN THE PROBATE COURT
J. HOWARD MARSHALL, III, ET AL.,	§	NUMBER TWO (2) OF
V.	§	
ROBERT S. MACINTYRE, ET AL.	§	HARRIS COUNTY, TEXAS

PLAINTIFF VICKIE LYNN MARSHALL'S THIRD AMENDED CONSOLIDATED PETITION AND WILL CONTEST

(Filed Jan. 4, 2000)

Plaintiff Vickie Lynn Marshall ("Plaintiff" or – "Vickie" or "Mrs. Marshall") files this her Third Amended Consolidated Petition and Will Contest complaining of the conduct of the Defendants named herein and in support thereof would respectfully show the Court the following:

PARTIES

1. Plaintiff and Contestant Vickie Lynn Marshall, also known as Anna Nicole Smith) has previously appeared in this docket and has an ancillary proceeding under No. 276, 815, and No. 276, 815-402 and other dockets with which consolidation has been requested and understood to have been granted.

2. Defendant Robert S. MacIntyre, Jr., is sued in his capacity as the temporary administrator of the estate of J. Howard Marshall II, and he has appeared in this action.

3. Defendant E. Pierce Marshall ("Pierce Marshall") is an individual who maintains a place of business in Harris County, Texas, and who has appeared herein. Pierce Marshall is sued as an individual, and is also sued with respect to his present or former capacities as trustee and/or alter ego or dominant shareholder of the following entities: the J. Howard Marshall II Living Trust and all successors and assigns thereto as the purported agent or "attorney in fact" for J. Howard Marshall II under one or more powers of attorney purportedly executed by J Howard Marshall II before his death: as trustee of the Marshall Museum and Library (formerly Marshall Museum of Racing) of Racing (ad [sic] all successors and assigns thereto): Marshall Petroleum Incorporated (also known as "Trof, Inc."). Marshall Oil & Gas L.L.C.: as trustee of the Marshall Grandchildren's Trust for the benefit of E. Pierce Marshall, Jr., as trustee of the Marshall Grandchildren's Trust for the benefit of Preston Marshall: as Trustee of the Marshall Petroleum, Inc. Stock Holding Trust; as Trustee of the Bettye B. Marshall Living Trust (also sometimes referred to as the Bettye B. Marshall Estate Trust: as Trustee of the J. Howard Marshall II, Marital Trust Number Two as Trustee of the E. Pierce Marshall Family Trust created under the Bettye B. Marshall Living Trust Indenture dated October 30, 1990. Pierce Marshall has entered an appearance in this case in all of the above mentioned capacities.

* * *

JURISDICTION AND VENUE

14. This Court has jurisdiction pursuant to sections 5 and 5A of the Texas Probate Code. The matter is related to the estate of J. Howard Marshall II and the administration thereof, which is pending in said Court. Venue is

proper because of the matters described herein arose in part in Harris County, Texas.

* * *

Tortious Interference and Conspiracy To Commit Tortious Interference

62. As discussed in greater detail herein and above. Defendants Pierce Marshall, Edward Hunter, Finley Hilliard, and their co-conspirators tortiously interfered with *inter alia*. Mr. Marshall's promises to Vickie. Mrs. Marshall's expectancy of an inter-vivos gift from Mr. Marshall and with Mrs. Marshall expectancy of a testamentary gift from Mr. Marshall. As noted above, Defendants acted to prevent Mrs. Marshall from receiving gifts and inheritance that she otherwise would have received from Mr. Marshall by their acts of fraud, misrepresentation, deceit, duress, undue influence, self dealing, breach of fiduciary duty, and other tortious means as more fully identified above. Defendants not only acted individually to tortiously interfere with Mrs. Marshall's expectancy in these matters, but these defendants also acted jointly to bring about this tortious interference with Mrs. Marshall's expectancy. Defendants acted jointly and in a civil conspiracy to bring about this tortious interference by entering into a meeting of the minds with regard to these acts of tortious interference, and committing one or more actions in furtherance of this conspiracy to tortiously interfere with Mr. Marshall's promises and agreements, Mrs. Marshall's expectancy of receiving an inter-vivos gift from Mr. Marshall, and Mrs. Marshall's expectancy of receiving a testamentary gift.

63. Although the transactions taken by these co-conspirator defendants in furtherance of their joint purpose of tortiously interfering with Mr. Marshall's promises, Mrs. Marshall's expectancy of inter-vivos gifts and testamentary gifts from Mr. Marshall, transactions taken in furtherance of this conspiracy are more fully described in this Petition above. The following are a list of transactions designed by, prepared by, documented by, participated in, or consented to by these various defendants in furtherance of this civil conspiracy.

- The gift of 2,146 MPI shares to Pierce on August 24, 1993
- The bargain sale of 2,044 MPI shares to Pierce on August 24, 1993
- The sale of 35,466 MPI shares to Pierce on August 25, 1993
- The gift of 47,288 MPI shares to a Grantor Retained Annuity Trust (GRAT) on August 25, 1993
- The redemption of 14,065 MPI shares on August 26, 1993
- The gift of a portion of the promissory note received from Pierce for the 35,466 MPI share sale to a Charitable Remainder Annuity Trust (CRAT=1) on November 30, 1993
- The attempted gift of another portion of the promissory note received from Pierce for the 35,466 MPI share sale to a second Charitable Remainder Annuity Trust (CRAT=2) on December 28, 1993 (failed to complete)
- The gift of 13 MPI shares each to Pierce's wife, Elaine, and trusts for each of Pierce's two sons. E. Pierce, Jr. and Preston, on December 28, 1993

- The sale of 153 MPI shares to Pierce on June 16, 1994
- The conversion of the Living Trust from a revocable trust required to pay Mr. Marshall all its income at least quarterly (unless directed otherwise by Mr. Marshall) to an irrevocable discretionary income trust on July 13, 1994
- The provision, by Act of Procuration, of a Durable Power of Attorney with terms that make it extremely difficult to revoke, over Mr. Marshall's affairs to Pierce on July 13, 1994
- The award of 24,653 shares of The Electron Corp. stock (subject to certain restrictions), owned by the Living Trust and valued at more than $240,000, to Pierce as a trustee fee on July 15, 1994
- Mr. Marshall's resignation as co-trustee (with Pierce) of the Living Trust and his replacement by Hilliard on August 2, 1994
- The Renunciation of Mr. Marshall's representative's rights to distributions for administrative costs from the Living Trust after his death on December 28, 1994
- The declaration that Mr. Marshall is unfit to remain on MPI's Board because he is "temporarily incapacitated," thus leaving Pierce as its sole director, on May 26, 1995
- The redemption of 63,051 MPI shares for a private annuity on May 26, 1995

- The redemption of the GRAT's 47.288 MPI shares for a promissory note on May 26, 1996
- The contribution of the remainder of the promissory note received from Pierce for the 35,466 MPI share sale to Marshall gas & Oil, LLC (MGO) in exchange for a 99 percent interest in MGO on May 26, 1995
- The change to the beneficiaries of the Living Trust to add a specific bequest of the 99 percent interest in MGO to a newly formed private foundation, the Marshall Museum and Library (Museum) on May 26, 1995
- The gift of all rights, title, and interest in the GRAT for a period of six years to a Charitable Lead Unitrust (CLUT) benefiting the Museum on May 29, 1995

64. Mrs. Marshall is pursuing *in personam* claims for tortious interference against Mr. E. Pierce Marshall, individually, in a proceeding before the United States Bankruptcy Court for the Central District of California, Los Angeles Division. As such although Mrs. Marshall believes a finding in that matter against E. Pierce Marshall on her tortious interference claims may ultimately be *res judicata* in this proceeding, Mrs. Marshall is not currently asserting here that claim or other *in personam* claims currently asserted against E. Pierce Marshall, individually, in the bankruptcy proceeding. Mrs. Marshall continues to assert her above-claims for tortious interference and civil conspiracy, however, against all other above-referenced defendants, and against E. Pierce Marshall in all other capacities.

65. As a result of these above actions, Mrs. Marshall has suffered actual damages in excess of the minimum jurisdictional requirements of this Court.

* * *

NO. 276,815-402

IN THE ESTATE OF J. HOWARD MARSHALL, II, DECEASED	§	**IN THE PROBATE COURT**
J. HOWARD MARSHALL, III	§	**NUMBER TWO OF**
v.	§	**HARRIS COUNTY, TEXAS**
E. PIERCE MARSHALL, et al	§	

PLAINTIFF VICKIE MARSHALL'S PRELIMINARY JURY QUESTIONS AND INSTRUCTIONS

(Sept. 2000)

Plaintiff Vickie Marshall hereby submits her Preliminary Jury Questions and Instructions.

The Plaintiff submits these preliminary draft questions and instructions at the Court's request. Plaintiff respectfully reserves her right to make additional, different, or alternative submissions of questions and instructions, and objections to questions and instructions submitted to the jury in the Court's Charge, at the appropriate time during the formal charge conference in this matter as the evidence and proceedings at trial may warrant.

Respectfully submitted,

CUNNINGHAM, DARLOW, ZOOK & CHAPOTON, LLP

By: _____

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* * *

JURY CHARGES AND INSTRUCTIONS

QUESTION NO. ___ [TORTIOUS INTERFERENCE]

Did any of the Defendants listed below tortiously interfere with the gifts, if any, Mr. Marshall intended for Mrs. Vickie Marshall?

Tortious interference occurred if:

a. there was a reasonable probability that Mrs. Vickie Marshall would have received the gifts; and

b. one or more of the Defendants intentionally prevents Mrs. Vickie Marshall from receiving the gifts with the purpose of causing damage to her.

"Gifts" include, in the broadest sense, any donations, gratuities or benefactions that Mrs. Vickie Marshall would have received from Mr. Marshall. Complete certainty that the gifts would have been made is not required.

Tortious interference occurs when Mr. Marshall was induced to not make the gifts that he intended for Mrs. Vickie Marshall by fraud, duress, deception, defamation, breach of fiduciary duty, or by the forgery, alteration or suppression of a document that would have made the gift.

The wrongful conduct that prevents a gift can include false statements of fact; the insertion in a document

or documents executed by Mr. Marshall of provisions or pages which he did not know were inserted; the omission of intended provisions or pages in a document or documents that Mr. Marshall did not know were omitted; misreading documents to Mr. Marshall; preventing Mr. Marshall from making the gift; wrongfully inducing Mr. Marshall to sign a document which he did not intend to sign by the surreptitious substitution of a different document; or other fraudulent or unlawful means.

Please answer "Yes" or "No" as to each of the following persons:

	ANSWER:
E. Pierce Marshall	_____
Finley Hilliard	_____
Kenneth Farrar	_____

QUESTION NO. ___

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate Mrs. Vickie Marshall for her damages, if any, that were proximately caused by such interference?

The damages recoverable for tortious interference with gifts are the value of such gifts, and includes all income, property and appreciation that may arise from such gifts.

Do not add any amount for interest on damages, if any.

Answer in dollars and cents, if any:

ANSWER: $_____

* * *

REPORTER'S RECORD
VOLUME 1 OF 2 VOLUMES

CAUSE NO. 276,815

THE ESTATE OF J. HOWARD MARSHALL, II DECEASED	IN THE PROBATE COURT NUMBER TWO OF HARRIS COUNTY, TEXAS

CAUSE NO. 276,815-402

J. HOWARD MARSHALL, III, ET AL VS. ROBERT MACINTYRE, ET AL	IN THE PROBATE COURT NUMBER TWO OF HARRIS COUNTY, TEXAS

OPENING STATEMENTS

OCTOBER 2, 2000

On the 2nd day of October, 2000, the following proceedings came on to be heard in the above-entitled and numbered cause, before the Honorable Mike Wood, Judge presiding, held in Houston, Harris County, Texas:

Proceedings reported by computerized stenotype machine, Reporter's Record produced by Computer-Assisted Transcription.

* * *

[105] MR. CUNNINGHAM: Thank you, Your Honor. May it please the Court, Ladies and Gentlemen of the jury.

My name is Tom Cunningham, and I represent [106] Mrs. J. Howard Marshall.

* * *

[133] this is a case about tortious interference with an intent to give an inter vivos gift during life. . . .

* * *

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

In re VICKIE LYNN MARSHALL, Debtor.	Case No. LA 96-12510-SB Adv. No.: LA 96-01838-SB Chapter 11
E. Pierce Marshall, Plaintiff, vs. Vickie Lynn Marshall, Defendant.	**SUPPLEMENTAL MEMORANDUM OF DECISION FOLLOWING TRIAL** (Filed Nov. 21, 2000)
Vickie Lynn Marshall, Counterclaimant, vs. E. Pierce Marshall, Counterdefendant.	DATE: December 6, 2000 TIME: 11:00 a.m. CTRM: 1575

The court on its own motion hereby supplements its amended decision of October 6, 2000 to clarify the court's ruling that this is a core proceeding, to issue its ruling on punitive damages, and to set a further hearing on the proposed findings of fact, conclusions of law and form of judgment to be entered in this adversary proceeding.

1. Core Proceeding

This proceeding began as a proof of claim for defamation that E. Pierce Marshall filed in this chapter 11 case

pursuant to Bankruptcy Code § 501. In response to Pierce Marshall's proof of claim, the debtor objected to the claim and filed a counterclaim for tortious interference with her expectancy of a gift from her deceased husband J. Howard Marshall II, who was Pierce Marshall's father. The counterclaim turned the claim objection into an adversary proceeding pursuant to Rule 3007 of the Federal Rules of Bankruptcy Procedure.

On summary judgment, the debtor prevailed on Pierce Marshall's claim. The debtor also prevailed on the counterclaim after trial on the merits in November, 1999. *See Marshall v. Marshall (In re Marshall)*, 253 B.R. 550 (Bankr. C.D. Cal. 2000).

The court has previously determined that this adversary proceeding is a core proceeding, as defined in 28 U.S.C. § 157. Section 157(b)(2) provides in relevant part:

> Core proceedings include . . .
>
> . . .
>
> (B) allowance or disallowance of claims against the estate . . . ;
>
> (C) counterclaims by the estate against persons filing claims against the estate. . . .

28 U.S.C. § 157 (West 2000). Both the objection to claim and the counterclaim are thus core proceedings under this statutory definition. *See Sun West Distribs., Inc. v. Grumman Energy Sys. Co. (In re Sun West Distribs., Inc.)*, 69 B.R. 861, 864 (Bankr. S.D. Cal. 1987).

2. Punitive Damages

The court has previously determined that this is a proper case for the award of punitive damages. After further examination of the record in this case, the court concludes that the time is now ripe to award the punitive damages.

The major purpose of awarding punitive damages is to punish and deter the wrongful conduct of a party. Under Texas law, the courts generally consider five factors in determining a reasonable punitive damages award: (1) the nature of the wrong; (2) the character of the conduct involved; (3) the degree of culpability of the wrongdoer; (4) the situation and sensibilities of the parties concerned; and (5) the extent to which the defendant's conduct offends the public sense of justice and propriety. *See, e.g., Alamo Nat'l Bank v. Kraus*, 616 S.W.2d 908, 910 (Tex. 1981); *North Am. Refractory Co. v. Easter*, 988 S.W.2d 904, 920 (Tex. App. 1999); *Cantu v. Burton*, 921 S.W.2d 344, 351 (Tex. App. 1996). The amount of punitive damages to award the debtor requires the court to evaluate the actions of Pierce Marshall in light of these five factors.

In its prior ruling the court has made findings on two of these factors: the nature of the wrong and the character of the conduct involved. Three factors remain to be examined: the degree of Pierce Marshall's culpability, the extent to which his conduct offends the public sense of justice and propriety, and the situation and sensibilities of the parties. In addition, certain of the court's findings in *Marshall, supra*, are pertinent to all of these factors, and are incorporated herein by reference.

a. Degree of Culpability

In determining the degree of culpability under Texas law, the court considers the defendant's state of mind, the degree of his or her conscious indifference, and his malice. *See Ellis County State Bank v. Keever*, 936 S.W.2d 683, 687 (Tex. 1996). Texas law defines malice as ill will, evil motive, gross indifference or reckless disregard of the rights of others, which may be established by direct or circumstantial evidence. *See J.C. Penny Company, Inc. v. Ruth*, 982 S.W.2d 586, 590 (Tex. 1998).

The court finds that Pierce Marshall's actions as previously determined were undertaken with intentional disregard for the rights of the debtor and the procedures of this court. The court finds that Pierce Marshall's behavior towards the debtor is intentional and reprehensible, and that it constitutes malice toward her.

b. Situation and Sensibilities of the Parties

The situation and sensibilities of the parties refers to evidence of remorse, remedial measures, and ability to pay punitive damages. *See Keever*, 936 S.W.2d at 688.

Pierce Marshall has shown no remorse whatsoever with regard to his tortious actions to keep the debtor from receiving the share of her husband's fortune that he directed his lawyers to arrange for her. Moreover, Pierce Marshall has continued to disobey the court's orders to produce documents for discovery and has raised objections that the court has repeatedly found to be frivolous.

The wealth of the defendant is relevant in determining the amount of punitive damages because such information assists the court in determining an amount sufficient to effectively punish the defendant *See White v. Sullins*, 917 S.W.2d 158, 163 (Tex. 1996). Pierce Marshall has obtained for himself and his immediate family the entire 16% interest in Koch Industries that his father held. This court has found that these assets were worth more than $1.6 billion as of August 31, 1999. The court finds that Pierce Marshall easily has the ability to pay the punitive damages assessed herein.

d. Offending Public Sense of Justice and Propriety

Finally, the Court believes that Pierce Marshall's actions described in this court's prior ruling offend the public sense of justice and propriety. In particular, his totally unjustified refusal to provide discovery in this adversary proceeding has prevented this court from determining this adversary proceeding on its merits. Because this is a high profile case that has attracted substantial public attention, Pierce Marshall's conduct substantially promotes a disrespect for the federal courts and the degree of justice that they dispense.

At the same time, the court must keep its mind that an award of punitive damages is subject to due process considerations prohibiting grossly excessive punishment. *See BMW v. Gore*, 517 U.S. 559 (1996).

In light of all these factors, the court assesses punitive damages against Pierce Marshall in the amount of $25 million. In the court's judgment, this amount sufficiently serves the purpose of punishing and deterring Pierce

Marshall's behavior. At the same time, the amount of the damages satisfies constitutional considerations regarding excessiveness.

3. Findings of Fact and Conclusions of Law

The debtor requests that the court enter certain specified additional findings of fact and conclusions of law not incorporated into its amended *Marshall* decision. *See* Emergency Ex Parte Application for Entry of Final Judgment and for Entry of Supplemental Findings, at 9. Requests 2 and 3 are denied. Pierce Marshall is hereby given an opportunity to respond to Requests 1 and 4 by November 30, 2000. A hearing on these requests is set for December 6, 2000 at 11:00 a.m.

4. Nature and Form of Judgment

Because the court has now made its award of punitive damages, judgment is now ready for entry in this adversary proceeding. Such a judgment should include the award of $449,754,934 in compensatory damages and $25 million in punitive damages.

The debtor also requests an injunction against Pierce Marshall, to require him (1) to deposit 428,333 shares of common stock in Koch Industries, Inc. and 1934 shares of preferred stock with the court; (2) to prohibit Pierce Marshall and his agents from transferring or encumbering these shares of Koch stock; and (3) to require that all dividends on these shares of stock be deposited into a trust account for the debtor. These provisions would remain in force until this court's money judgment is satisfied.

The court questions whether these provisions are appropriate as a part of the court's judgment. The court particularly would like to see authority that such an order is appropriate in place of enforcement procedures to be undertaken by the debtor.

The court directs the parties to brief this issue for the December 6 hearing. Any briefs by the debtor in support of these provisions shall be served by same day delivery and filed by November 28, 2000. Any opposition shall be served by same day delivery and filed (with a copy delivered to chambers) by December 1, 2000.

Dated: November 21, 2000

/s/ Samuel L. Bufford
Samuel L. Bufford
United States Bankruptcy
Judge

[Certificate Of Mailing Omitted In Printing]

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Attorneys for Debtor and Counterclaimant
VICKIE LYNN MARSHALL

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

LOS ANGELES DIVISION

In re VICKIE LYNN MARSHALL, Debtor.	BANKR. CASE NO. LA 96-12510SB Adversary No. 96-01838 Bankr Judge: Hon. Samuel L. Bufford
E. Pierce Marshall, Plaintiff, vs. Vickie Lynn Marshall, Defendant.	**FINAL JUDGMENT** (Filed Dec. 29, 2000) TRIAL DATE: October 25, 1999 DATE: December 6, 2000 TIME: 11:00 PLACE: Courtroom 1575 Roybal Federal Building 255 E. Temple Street Los Angeles, CA 90012
Vickie Lynn Marshall, Counterclaimant, vs. E. Pierce Marshall, Counterdefendant.	

TO THE HONORABLE SAMUEL L. BUFFORD, UNITED STATES BANKRUPTCY JUDGE, AND OTHER INTERESTED PARTIES:

This action came on for trial before the Court, and the issues having been duly tried and a decision having been duly rendered,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of Vickie Lynn Marshall, and against E. Pierce Marshall, as follows:

1. That Vickie Lynn Marshall recovers from E. Pierce Marshall compensatory damages in the amount of $449,754,134.

2. That the above amount shall bear interest from and including October 6, 2000 at the rate set forth in 28 U.S.C. § 1961.

3. That Vickie Lynn Marshall recovers from E. Pierce Marshall punitive damages in the amount of $25,000,000.

4. That the above amount shall bear interest from and including November 21, 2000 at the rate set forth in 28 U.S.C. § 1961.

5. That E. Pierce Marshall recovers nothing against Vickie Lynn Marshall.

6. That Vickie Lynn Marshall recovers from E. Pierce Marshall her costs of suit in this entire action in the amount of ___.

7. That the amounts, if any, which are hereinafter collected for release or satisfaction of claims made in the

Texas probate action shall be deemed to be payments made toward satisfaction of this judgment.

~~8. That E. Pierce Marshall, his agents, employees, representatives and all persons acting in concert or participating with him, are directed to endorse and deposit with the Clerk of this Court, or anyone the Court appoints for this purpose, 4,283,325 shares of Koch Industries, Inc. ("Koch") common stock and 1934 shares of Koch preferred stock, which constitute 50% of the Koch shares held by E. Pierce Marshall individually or through Marshall Petroleum, Inc. ("MPI"), Trof, Inc., or its successors or assigns or the proportionate number of Koch shares in the event that Koch issues additional shares (e.g. stock split) – which will be held until such time as the money judgment set forth above has been satisfied. Notwithstanding the above, all or part of such stock may be released in response to a writ of execution on the money judgment set forth above.~~ [/s/ SLB]

~~9. That E. Pierce Marshall, his agents, employees, representatives and all persons acting in concert or participating with him, are enjoined and restrained (except or as provided in paragraph 7 above or in connection with a writ of execution on this money judgment) from directly or indirectly transferring, encumbering, or otherwise restricting or alienating, by any means whatsoever, E. Pierce Marshall's interest in Koch, whether held by E. Pierce Marshall individually or through MPI, Trof, Inc., or its successors or assigns, until such time as the money judgment set forth above has been satisfied.~~ [/s/ SLB]

~~10. That E. Pierce Marshall, his agents, employees, representatives and all persons acting in concert or participating with him, shall pay to Debtor any and all~~

~~proceeds or dividends from said Koch stock whether held by E. Pierce Marshall individually or through MPI, Trof, Inc. or its successors or assigns, into an interest-bearing trust account for the sole benefit of Vickie Lynn Marshall from the date of this judgment until such time as the money judgment set forth above has been satisfied, withdrawals from which may only be made for the purpose of satisfying the money judgment set forth above or in connection with a writ of execution on this Judgment.~~ [/s/ SLB]

~~11. The Court shall retain jurisdiction of this case for such other and further orders as may be necessary.~~ [/s/ SLB]

DATED: 12/29/2000

/s/ Samuel L. Bufford
HONORABLE
SAMUEL L. BUFFORD
UNITED STATES
BANKRUPTCY JUDGE

NO. 276,815-402

IN THE ESTATE OF J. HOWARD MARSHALL, II DECEASED	§	**IN THE PROBATE COURT**
J. HOWARD MARSHALL, III, *et al.*	§	
Plaintiffs	§	**NUMBER TWO OF**
v.	§	
ROBERT S. MACINTYRE, *et al*	§	**HARRIS COUNTY, TEXAS**
Defendants	§	

Charge of the Court

(Filed March 7, 2001)

LADIES AND GENTLEMEN OF THE JURY:

This case is submitted to you by asking questions about the facts, which you must decide from the evidence you have heard in this trial. You are the sole judges of the credibility of the witnesses and the weight to be given their testimony, but in matters of law, you must be governed by the instructions in this Charge. In discharging your responsibility on this Jury, you will observe all the instructions which have previously been given you. I shall now give you additional instructions which you should carefully and strictly follow during your deliberations.

1. Do not let bias, prejudice or sympathy play any part in your deliberations.

2. In arriving at your answers, consider only the evidence introduced here under oath and such exhibits, if any, as have been introduced for your consideration under the rulings of the Court, that is, what you have

seen and heard in this courtroom, together with the law as given you by the Court. In your deliberations, you will not consider or discuss anything that is not represented by the evidence in this case.

3. Since every answer that is required by the Charge is important, no juror should state or consider that any required answer is not important.

4. You must not decide who you think should win, and then try to answer the questions accordingly. Simply answer the questions, and do not discuss nor concern yourselves with the effect of your answers.

5. You will not decide the answer to a question by lot or by drawing straws, or by any other method of chance. Do not return a quotient verdict. A quotient verdict means that the jurors agree to abide by the result to be reached by adding together each juror's figures and dividing by the number of jurors to get an average. Do not do any trading on your answers; that is, one juror should not agree to answer a certain question one way if others agree to answer another question another way.

6. You may render your verdict upon the vote of ten or more members of the Jury The same ten or more of you must agree upon all of the answers made and to the entire verdict. You will not, therefore, enter into an agreement to be bound by a majority or any other vote of less than ten jurors. If the verdict and all of the answers therein are reached by unanimous agreement, the presiding juror shall sign the verdict for the entire Jury. If any juror disagrees as to any answer made by the verdict, those jurors who agree to all findings shall each sign the verdict.

7. You have been allowed to take notes during the trial of this case. You may have those notes with you in the jury room during your deliberations. The notes you have

taken are not evidence. Your personal recollection of the evidence takes precedence over any notes you have taken. You should base your verdict only on the evidence presented during the trial. You may not display your notes or disclose the contents of your notes to any other juror during your deliberations. To do so is a violation of these instructions.

These instructions are given you because your conduct is subject to review the same as that of the witnesses, parties, attorneys and the Judge. If it should be found that you have disregarded any of these instructions, it will by jury misconduct and it may require another trial by another jury; then all of our time will have been wasted. The presiding juror or any other who observes a violation of the Court's instructions shall immediately warn the one who is violating the same and caution the juror not to do so again. When words are used in this charge in a sense which varies from the meaning commonly understood, you are given a proper legal definition, which you are bound to accept in place of any other meaning.

Answer "Yes" or "No" to all questions unless otherwise instructed. A "Yes" answer must be based on a preponderance of the evidence. If you do not find that a preponderance of the evidence supports a "Yes" answer, then answer "No." The term "preponderance of the evidence" means the greater weight and degree of credible testimony or evidence introduced before you and admitted in this case. Whenever a question requires other than a "Yes" or "No" answer, your answer must be based on a preponderance of the evidence.

In answering a question based on a preponderance of the evidence, a fact may be established by direct evidence or by circumstantial evidence or both. A fact is established

by direct evidence when proved by documentary evidence or by witnesses who saw the act done or heard the words spoken. A fact is established by circumstantial evidence when it may be fairly and reasonably inferred from other facts proven.

"Clear and convincing evidence" means that the evidence presented must have been so clear, direct, weighty, and convincing as to enable you to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue. This is a greater degree of persuasion than is necessary to meet the preponderance of the evidence standard.

In answering a question based on "clear and convincing evidence", a "Yes" answer must be based on clear and convincing evidence, and if you do not find that clear and convincing evidence supports a "Yes" answer, then answer "No".

If you answer questions about damages, answer each question separately. Do not increase or reduce the amount in one answer because of the instructions in or your answers to any other questions about damages. Do not speculate about what any party's ultimate recovery may or may not be. Any recovery will be determined by the court when it applies the law to your answers at time of judgment.

DEFINITIONS

1. "Testamentary capacity," with respect to a will or codicil means sufficient mental ability at the time of the execution of the will or codicil for **J. Howard Marshall, II**:

a. to understand the affect of his act in making the will or codicil;

b. to understand the general nature and extent of his property;

c. to know his next of kin and the natural objects of bounty, and their claims on him; and

d. to have sufficient memory to collect in his mind the elements of the business to be transacted, to hold these elements long enough to perceive at least their obvious relation to each other, and to be able to form a reasonable judgment as to them.

2. "Natural objects of his bounty" means **J. Howard Marshall, II's** descendants unless the evidence indicates otherwise.

3. "Mental capacity", for the purpose of executing an instrument other than a will or codicil, exists when **J. Howard Marshall, II**, in executing the instrument, had sufficient mind and memory to understand the nature and effect of the act in which he was engaged and the business which he was transacting.

4. "Undue influence" means that there was such dominion and control exercised over the mind of **J. Howard Marshall II** when he executed the will, codicil or trust, under the facts and circumstances then existing, as to overcome his free will. In effect, the will of the party exerting undue influence was substituted for that of **J. Howard Marshall II** preventing him from exercising his own discretion and causing him to do what he would not have done but for such dominion or control.

NO. 276,815-402

IN THE ESTATE OF J. HOWARD MARSHALL, II DECEASED	§	**IN THE PROBATE COURT**
J. HOWARD MARSHALL, III, *et al.*	§	
Plaintiffs	§	**NUMBER TWO OF**
v.	§	
ROBERT S. MACINTYRE, *et al*	§	**HARRIS COUNTY, TEXAS**
Defendants	§	

Additional Definition

"Bettye B. Marshall Trusts" shall mean the Bettye B. Marshall Living Trust, J. Howard Marshall, II, Marital Trust Number Two, and the E. Pierce Marshall Family Trust created under the Bettye B. Marshall Trust Indenture dated October 30, 1980.

QUESTION NO. 1

Do you find that **J. Howard Marshall, II** had testamentary capacity when he executed the purported codicil dated June 11, 1993, Marshall Family Defendant Exhibit (MFDX) 567?

Answer "Yes" or "No"

Answer: Y

Go to Question No. 2.

QUESTION NO. 2

Do you find that **J. Howard Marshall, II** executed the purported codicil dated June 11, 1993, MFDX 567, as a result of undue influence exerted by **E. Pierce Marshall**?

Answer "Yes" or "No".

Answer: N

Go to Question No. 3.

QUESTION NO. 3

Do you find that **J. Howard Marshall, II** had testamentary capacity when he executed the purported will dated December 22, 1992, MFDX 560?

Answer "Yes" or "No".

Answer: Y

Go to Question No. 4.

QUESTION NO. 4

Do you find that **J. Howard Marshall, II** executed the purported will dated December 22, 1992, MFDX 560, as a result of undue influence exerted by **E. Pierce Marshall**?

Answer "Yes" or "No".

Answer: N

If you have answered "Yes" to Question No. 3 and "No" to Question No. 4, go to Question No. 19. Otherwise, go to Question No. 5.

If you have answered "No" to Question No. 3 or "Yes" to Question No. 4, then answer the following Question No. 5. Otherwise, do not answer Question No. 5.

QUESTION NO. 5

Do you find that **J. Howard Marshall, II** had testamentary capacity when he executed the purported will dated June 23, 1992, MFDX 559?

Answer "Yes" or "No".

Answer: _____

Go to Question No. 6.

If you have answered "No" to Question No. 3 or "Yes" to Question No. 4, then answer the following Question No. 6. Otherwise, do not answer Question No. 6.

QUESTION NO. 6

Do you find that **J. Howard Marshall, II** executed the purported will dated June 23, 1992, MFDX 559, as a result of undue influence exerted by **E. Pierce Marshall**?

Answer "Yes" or "No".

Answer: _____

If you have answered "Yes" to Question No. 5 and "No" to Question No. 6, go to Question No. 19. Otherwise, go to Question No. 7.

If you have answered "No" to Question No. 5 or "Yes" to Question No. 6, then answer the following Question No. 7. Otherwise, do not answer Question No. 7.

QUESTION NO. 7

Do you find that **J. Howard Marshall, II** had testamentary capacity when he executed the purported will dated October 19, 1990, MFDX 561?

Answer "Yes" or "No".

Answer: _____

Go to Question No. 8

If you have answered "No" to Question No. 5 or "Yes" to Question No. 6. then answer the following Question No. 5. Otherwise. do not answer Question No. 8.

QUESTION NO. 8

Do you find that **J. Howard Marshall, II** executed the purported will dated October 19, 1990, MFDX 561, as a result of undue influence exerted by **E. Pierce Marshall**?

Answer "Yes" or "No".

Answer: _____

If you have answered "Yes" to Question No. 7 and "No" to Question No. 8, go to Question No. 19. Otherwise, go to Question No. 9.

If you have answered "No" to Question No. 7 or "Yes" to Question No. 8, then answer the following Question No. 9. Otherwise, do not answer Question No. 9.

QUESTION NO. 9

Do you find that **J. Howard Marshall, II** had testamentary capacity when he executed the purported will dated April 21, 1989, MFDX 562?

Answer "Yes" or "No".

Answer: _____

Go to Question No. 10.

If you have answered "No" to Question No. 7 or "Yes" to Question No. 8, then answer the following Question No. 10. Otherwise, do not answer Question No. 10.

QUESTION NO. 10

Do you find that **J. Howard Marshall, II** executed the purported will dated April 21, 1989, MFDX 562, as a result of undue influence exerted by **E. Pierce Marshall**?

Answer "Yes" or "No".

Answer: _____

If you have answered "Yes" to Question No. 9 and "No" to Question No. 10, go to Question No. 19. Otherwise, go to Question No. 11.

If you have answered "No" to Question No. 9 or "Yes" to Question No. 10, then answer the following Question No. 11. Otherwise, do not answer Question No. 11.

QUESTION NO. 11

Do you find that **J. Howard Marshall, II** had testamentary capacity when he executed the purported will dated August 16, 1984, MFDX 563?

Answer "Yes" or "No".

Answer: _____

Go to Question No. 12.

If you have answered "No" to Question No. 9 or "Yes" to Question No. 10, then answer the following Question No. 12. Otherwise, do not answer Question No. 12.

QUESTION NO. 12

Do you find that **J. Howard Marshall, II** executed the purported will dated August 16, 1984, MFDX 563, as a result of undue influence exerted by **E. Pierce Marshall**?

Answer "Yes" or "No".

Answer: _____

If you have answered "Yes" to Question No. 11 and "No" to Question No. 12, go to Question No. 19. Otherwise, go to Question No. 13.

If you have answered "No" to Question No. 11 or "Yes" to Question No. 12, then answer the following Question No. 13. Otherwise, do not answer Question No. 13.

QUESTION NO. 13

Do you find that **J. Howard Marshall, II** had testamentary capacity when he executed the purported will dated September 1, 1982, MFDX 565?

Answer "Yes" or "No".

Answer: _____

Go to Question No. 14.

If you have answered "No" to Question No. 11 or "Yes" to Question No. 12, then answer the following Question No. 14. Otherwise, do not answer Question No. 14.

QUESTION NO. 14

Do you find that **J. Howard Marshall, II** executed the purported will dated September 1, 1982, MFDX 565, as a result of undue influence exerted by **E. Pierce Marshall**?

Answer "Yes" or "No".

Answer: _____

If you have answered "Yes" to Question No. 13 and "No" to Question No. 14, go to Question No. 19. Otherwise, go to Question No. 15.

If you have answered "No" to Question No. 13 or "Yes" to Question No. 14, then answer the following Question No. 15. Otherwise, do not answer Question No. 15.

QUESTION NO. 15

Do you find that **J. Howard Marshall, II** had testamentary capacity when he executed the purported codicil dated September 1, 1982, MFDX 566?

Answer "Yes" or "No".

Answer: _____

Go to Question No. 16.

If you have answered "No" to Question No. 13 or "Yes" to Question No. 14, then answer the following Question No. 16. Otherwise, do not answer Question No. 16.

QUESTION NO. 16

Do you find that **J. Howard Marshall, II** executed the purported codicil dated September 1, 1982, MFDX 566, as a result of undue influence exerted by **E. Pierce Marshall**?

Answer "Yes" or "No".

Answer: _____

Go to Question No. 17.

THERE IS NO QUESTION NO. 17

Go to Question 18.

THERE IS NO QUESTION NO. 18

Go to Question No. 19.

If you have answered "Yes" to Question No. 17 or "Yes" to Question No. 18, then answer the following Question No. 19. Otherwise, do not answer Question No. 19.

QUESTION NO. 19

Do you find that **J. Howard Marshall, II** lacked mental capacity when he executed the trust dated July 13, 1994 Plaintiff's Exhibit (PX) 227?

Answer "Yes" or "No".

Answer: N

Go to Question 20.

If you have answered "Yes" to Question No. 18 or "Yes" to Question No. 19, then answer the following Question No. 20. Otherwise, do not answer Question No. 20.

QUESTION NO. 20

Do you find that **J. Howard Marshall, II** executed the trust dated July 13, 1994, PX 227, as a result of undue influence exerted by **E. Pierce Marshall**?

Answer "Yes" or "No".

Answer: N

If you have answered "No" to Question No. 19 and "No" to Question No. 20, go to Question No. 38. Otherwise, go to Question No. 21.

If you have answered "Yes" to Question No. 19 or "Yes" to Question No. 20, then answer the following Question No. 21. Otherwise, do not answer Question No. 21.

QUESTION NO. 21

Do you find that **J. Howard Marshall, II** lacked mental capacity when he executed the trust dated December 22, 1992, PX 2081?

Answer "Yes" or "No".

Answer: _____

Go to Question No. 22.

If you have answered "Yes" to Question No. 19 or "Yes" to Question No. 20, then answer the following Question No. 22. Otherwise, do not answer Question No. 22.

QUESTION NO. 22

Do you find that **J. Howard Marshall, II** executed the trust dated December 22, 1992, PX 2081, as a result of undue influence exerted by **E. Pierce Marshall**?

Answer "Yes" or "No".

Answer: _____

If you have answered "No" to Question No. 21 and "No" to Question No. 22, go to Question No. 30. Otherwise, go to Question No. 23.

If you have answered "Yes" to Question No. 21 or "Yes" to Question No. 22, then answer the following Question No. 23. Otherwise, do not answer Question No. 23.

QUESTION NO. 23

Do you find that **J. Howard Marshall, II** lacked mental capacity when he executed the trust dated June 23, 1992, PX 1280?

Answer "Yes" or "No".

Answer: ___ ____

Go to Question No. 24.

If you have answered "Yes" to Question No. 21 or "Yes" to Question No. 22, then answer the following Question No. 24. Otherwise, do not answer Question No. 24.

QUESTION NO. 24

Do you find that **J. Howard Marshall, II** executed the trust dated June 23, 1992, PX 1280, as a result of undue influence exerted by **E. Pierce Marshall**?

Answer "Yes" or "No".

Answer: _____

If you have answered "No" to Question No. 23 and "No" to Question No. 24, go to Question No. 38. Otherwise, go to Question No. 25.

If you have answered "Yes" to Question No. 23 or "Yes" to Question No. 24, then answer the following Question No. 25. Otherwise, do not answer Question No. 25.

QUESTION NO. 25

Do you find that **J. Howard Marshall, II** lacked mental capacity when he executed the trust dated October 19, 1990, PX 1274?

Answer "Yes" or "No".

Answer: _____

Go to Question No. 26.

If you have answered "Yes" to Question No. 23 or "Yes" to Question No. 24, then answer the following Question No. 26. Otherwise, do not answer Question No. 26.

QUESTION NO. 26

Do you find that **J. Howard Marshall, II** executed the trust dated October 19, 1990, PX 1274, as a result of undue influence exerted by **E. Pierce Marshall**?

Answer "Yes" or "No".

Answer: _____

If you have answered "No" to Question No. 25 and "No" to Question No. 26, go to Question No. 38. Otherwise, go to Question No. 27.

If you have answered "Yes" to Question No. 25 or "Yes" to Question No. 26, then answer the following Question No. 27. Otherwise, do not answer Question No. 27.

QUESTION NO. 27

Do you find that **J. Howard Marshall, II** lacked mental capacity when he executed the trust amendment dated December 20, 1989, MFDX 195?

Answer "Yes" or "No".

Answer: _____

Go to Question No. 28.

If you have answered "Yes" to Question No. 25 or "Yes" to Question No. 26, then answer the following Question No. 28. Otherwise, do not answer Question No. 28.

QUESTION NO. 28

Do you find that **J. Howard Marshall, II** executed the trust amendment dated December 20, 1989, MFDX 195, as a result of undue influence exerted by **E. Pierce Marshall**?

Answer "Yes" or "No".

Answer: _____

If you have answered "No" to Question No. 27 and "No" to Question No. 28, go to Question No. 38. Otherwise, go to Question No. 29.

If you have answered "Yes" to Question No. 27 or "Yes" to Question No. 28, then answer the following Question No. 29. Otherwise, do not answer Question No. 29.

QUESTION NO. 29

Do you find that **J. Howard Marshall, II** lacked mental capacity when he executed the trust dated April 21, 1989, PX 1266?

Answer "Yes" or "No".

Answer: _____

Go to Question No. 30.

If you have answered "Yes" to Question No. 27 or "Yes" to Question No. 28, then answer the following Question No. 30. Otherwise, do not answer Question No. 30.

QUESTION NO. 30

Do you find that **J. Howard Marshall, II** executed the trust dated April 21, 1989, PX 1266, as a result of undue influence exerted by **E. Pierce Marshall**?

Answer "Yes" or "No".

Answer: _____

If you have answered "No" to Question No. 29 and "No" to Question No. 30, go to Question No. 38. Otherwise, go to Question No. 31.

If you have answered "Yes" to Question No. 29 or "Yes" to Question No. 30, then answer the following Question No. 31. Otherwise, do not answer Question No. 31.

QUESTION NO. 31

Do you find that **J. Howard Marshall, II** lacked mental capacity when he executed the trust amendment dated March 1, 1985, MFDX 166?

Answer "Yes" or "No".

Answer: _____

Go to Question No. 32.

If you have answered "Yes" to Question No. 29 or "Yes" to Question No. 30, then answer the following Question No. 32. Otherwise, do not answer Question No. 32.

QUESTION NO. 32

Do you find that **J. Howard Marshall, II** executed the trust amendment dated March 1, 1985, MFDX 166, as a result of undue influence exerted by **E. Pierce Marshall**?

Answer "Yes" or "No".

Answer: _____

If you have answered "No" to Question No. 31 and "No" to Question No. 32, go to Question No. 38. Otherwise, go to Question No. 33.

If you have answered "Yes" to Question No. 31 or "Yes" to Question No. 32, then answer the following Question No. 33. Otherwise, do not answer Question No. 33.

QUESTION NO. 33

Do you find that **J. Howard Marshall, II** lacked mental capacity when he executed the trust dated August 16, 1984, PX 1255?

Answer "Yes" or "No".

Answer: _____

Go to Question No. 34.

If you have answered "Yes" to Question No. 31 or "Yes" to Question No. 32, then answer the following Question No. 34. Otherwise, do not answer Question No. 34.

QUESTION NO. 34

Do you find that **J. Howard Marshall, II** executed the trust dated August 16, 1984, PX 1255, as a result of undue influence exerted by **E. Pierce Marshall**?

Answer "Yes" or "No".

Answer: _____

If you have answered "No" to Question No. 33 and "No" to Question No. 34, go to Question No. 38. Otherwise, go to Question No. 35.

If you have answered "Yes" to Question No. 33 or "Yes" to Question No. 34, then answer the following Question No. 35. Otherwise, do not answer Question No. 35.

QUESTION NO. 35

Do you find that **J. Howard Marshall, II** lacked mental capacity when he executed the trust dated September 1, 1982, PX 2171?

Answer "Yes" or "No".

Answer: _____

Go to Question No. 36.

If you have answered "Yes" to Question No. 33 or "Yes" to Question No. 34, then answer the following Question No. 36. Otherwise, do not answer Question No. 36.

QUESTION NO. 36

Do you find that **J. Howard Marshall, II** executed the trust dated September 1, 1982, PX 2171, as a result of undue influence exerted by **E. Pierce Marshall**?

Answer "Yes" or "No".

Answer: _____

Go to Question No. 38.

THERE IS NO QUESTION NO. 37.

QUESTION NO. 38

On December 1 and 2, 1980, did **J. Howard Marshall, II** and **J. Howard Marshall, III** enter into an agreement providing that **J. Howard Marshall, II** would treat **J. Howard Marshall, III** and **E. Pierce Marshall** equally in **J. Howard Marshall, II's** estate planning and property?

In deciding whether the parties reached an agreement, you may consider what they said and did in light of the surrounding circumstances, including any earlier course of dealings. You may not consider the parties' unexpressed thoughts or intentions.

Answer "Yes" or "No".

Answer: N

If you answered Question No. 38 "Yes", go to Question No. 39. Otherwise, go to Question No. 42.

If you have answered "Yes" to Question No. 38, then answer the following Question No. 39. Otherwise, do not answer Question No. 39.

QUESTION NO. 39

Did the agreement between **J. Howard Marshall, II** and **J. Howard Marshall, III**, you have found in answer to Question No. 38 include an agreement that **J. Howard Marshall, III** and his family would receive a gift or inheritance equal to the value of any gift (other than annual exclusion gifts) or inheritance received by **E. Pierce Marshall** and his family from **J. Howard Marshall, II**?

It is your duty to interpret the language of the agreement. You must decide the meaning of the agreement by determining the intent of the parties at the time of the agreement. Consider all of the facts and circumstances surrounding the making of the agreement, the interpretation placed on the agreement by the parties, and the conduct of the parties.

Answer "Yes" or "No".

Answer: _____

If you answered "Yes" to Question No. 39, go to Question No. 40. Otherwise, go to Question No. 42.

If you have answered "Yes" to Question No. 39, then answer the following Question No. 40. Otherwise, do not answer Question No. 40.

QUESTION NO. 40

Did **J. Howard Marshall, II** fail to comply with the agreement you found to exist in Question No. 39?

Answer "Yes" or "No".

Answer: _____

If you answered "Yes" to Question No. 40, go to Question No. 41. Otherwise, go to Question No. 42.

If you have answered "Yes" to Question No. 40, then answer the following Question No. 41. Otherwise, do not answer Question No. 41.

QUESTION NO. 41

What sum of money, if any, if paid now in cash would fairly and reasonably compensate **J. Howard Marshall, III** for his damages, resulting from **J. Howard Marshall, II's** failure to comply, if any, with the agreement?

Consider the following element, if any, and none other:

The value of gifts, if any, made to **E. Pierce Marshall** and his family by **J. Howard Marshall, II**, not including annual exclusion gifts, after December 2, 1980. The value must be determined as of the date of the gift

A "gift" is a voluntary transfer of property to another made gratuitously and without consideration.

Do not add any amount for interest on damages, if any.

Answer in dollars and cents, if any.

Answer: $_____

Go to Question No. 42.

If you have answered "No" to Question No. 39, then answer the following Question No. 42. Otherwise, do not answer Question No. 42.

QUESTION NO. 42

Did **J. Howard Marshall, II** commit fraud upon **J. Howard Marshall, III**?

Fraud occurs when –

a. a party makes a material misrepresentation;

b. the misrepresentation is made with knowledge of the falsity or made recklessly without any knowledge of the truth and as a positive assertion,

c. the misrepresentation is made with the intention that is should be acted upon by the other party, and

d. the other party acts in reliance on the misrepresentation and thereby suffers injury.

"Misrepresentation" means a promise of future performance made with an intent not to perform as promised.

Answer "Yes" or "No"

Answer: N

If you answered "Yes" to Question No. 42, go to Question No. 43. Otherwise, go to Question No. 45.

If you have answered Question No. 42 "Yes", then answer the following Question No. 43. Otherwise, do not answer Question No. 43.

QUESTION NO. 43

What sum of money, if any, if paid now in cash would fairly and reasonably compensate **J. Howard Marshall, III** for his damages, if any, proximately caused by the fraud committed by **J. Howard Marshall, II**?

The measure of damages for fraud is the difference between the actual value of that which **J. Howard Marshall, III** received and the value of that which he would have received but for the fraud.

Do not include any amount for interest, if any.

Answer in dollars and cents, if any.

Answer: $_____

Go to Question No. 44.

If you have answered "Yes" to Question No. 40, then answer the following Question No. 44. Otherwise, do not answer Question No. 44.

QUESTION NO. 44

Did **E. Pierce Marshall** intentionally interfere with the agreement between **J. Howard Marshall, II** and **J. Howard Marshall, III**?

Interference is intentional if committed with the desire to interfere with the contract or with the belief that interference is substantially certain to result.

A party charged with interference must know about the actual agreement.

Answer "Yes" or "No".

Answer: _____

Go to Question No. 45.

QUESTION NO. 45

Did **E. Pierce Marshall** tortiously interfere with **J. Howard Marshall, III's** right, if any, to inherit from **J. Howard Marshall, II**?

Tortious interference with inheritance occurs when:

a. a party has an expectancy of inheritance or gift;

b. there is a reasonable certainty that the expectancy would have been realized, but for the interference;

c. the interference with the expectancy is intentional and without just or excuse;

d. the interference takes the form of conduct such as fraud, duress or undue influence; and

e. damages result from the interference.

Answer "Yes" or "No":

Answer: N

If you have answered "Yes" to Question No. 45 or Question No. 45, go to Question No. 46. Otherwise, go to Question No. 49.

If you have answered "Yes" to Question No. 44 or "Yes" to Question No. 45, then answer the following Question No. 46. Otherwise, do not answer Question No. 46.

QUESTION NO. 46

What sum of money, if paid now in cash, would fairly and reasonably compensate **J. Howard Marshall, III** for his damages, if any, proximately caused by the intentional interference found by you in answer to Questions No. 44 or No 45.

You may consider the following element of damages and no others:

Actual pecuniary losses caused by the interference;

Answer in dollars and cents, if any.

Answer: $_____

Go to Question No. 47.

If you have answered Question No. 44 or Question No. 45 "Yes", then answer the following Question No. 47. Otherwise, do not answer Question No. 47.

QUESTION NO. 47

Do you find by clear and convincing evidence that the tortious interference found by you, if any, in Question No. 44 or Question No. 45, was committed by **E. Pierce Marshall** with malice?

"Malice" means:

(a) a specific intent by **E. Pierce Marshall** to cause substantial injury to **J. Howard Marshall III**; or

(b) an act or omission by **E. Pierce Marshall**,

(i) which, when viewed objectively from the standpoint of **E. Pierce Marshall** at the time of its occurrence, involved an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and

(ii) of which **E. Pierce Marshall** had actual, subjective awareness of the risk involved, but nevertheless proceeded with conscious indifference to the rights, safety, or welfare of others.

Answer "Yes" or "No":

Answer: _____

If your answer is "Yes" to Question No. 47, go to Question No. 48. Otherwise, go to Question No. 49.

If you have answered "Yes" to Question No. 47, then answer the following Question No. 48 Otherwise, do not answer Question No. 48.

QUESTION NO. 48

What sum of money, if any, if paid now in cash, should be assessed against **E. Pierce Marshall** and awarded to **J. Howard Marshall, III** as exemplary damages for the conduct found in response to Question No. 48?

"Exemplary damages" means an amount that you may in your discretion award as a penalty or by way of punishment.

Factors to consider in awarding exemplary damages, if any, are –

a) The nature of the wrong;

b) The character of the conduct involved;

c) The degree of culpability of **E. Pierce Marshall**;

d) The situation and sensibilities of the parties concerned;

e) The extent to which such conduct offends a public sense of justice and propriety.

Answer dollars and cents, if any.

Answer: $_____

Go to Question No. 49.

If you have answered:

"No" to Question No. 13 or "Yes" to Question No. 14; or

"Yes" to Question No. 35 or "Yes" to Question No. 36; or

"Yes" to Question No. 40; or

"Yes" to Question No. 42,

then answer the following Question No. 49. Otherwise, do not answer Question No. 49.

QUESTION NO. 49

Do you find that a relationship of trust and confidence existed between **E. Pierce Marshall** and **J. Howard Marshall, II** prior to and on August 24, 1993?

A relationship of trust and confidence existed if **J. Howard Marshall II** justifiably placed trust and confidence in **E. Pierce Marshall** to act in **J. Howard Marshall II's** best interest. **J. Howard Marshall II's** subjective trust and feelings alone do not justify transforming arm's-length dealings into a relationship of trust and confidence.

Answer "Yes" or "No".

Answer: _____

Go to Question No. 50

If you have answered "Yes" to Question No. 49, then answer the following Question No. 50. Otherwise do not answer Question No. 50.

QUESTION NO. 50

Did **E. Pierce Marshall** comply with his fiduciary duties to **J. Howard Marshall, II** with regard to any of the following transactions:

You are instructed as that because of their relationship of trust and confidence. **E. Pierce Marshall** owed **J. Howard Marshall II** a fiduciary duty. To prove he complied with his duty, **E. Pierce Marshall** must show:

a. The transactions in question were fair and equitable to **J. Howard Marshall, II**.

b. **E. Pierce Marshall** made reasonable use of the confidence that **J. Howard Marshall II** placed in him;

c. **E. Pierce Marshall** acted in the utmost good faith and ~~failed to exercise~~ exercised the most scrupulous honesty toward **J. Howard Marshall II**;

d. **E. Pierce Marshall** placed the interests of **J. Howard Marshall II** before his own, did not use the advantage of his position to gain a benefit for himself at the expense of **J. Howard Marshall II**, and did not place himself in any position where his self interest might conflict with his obligations as a fiduciary; and

e. **E. Pierce Marshall** fully and fairly disclosed all important information to **J. Howard Marshall II** concerning the transactions.

Answer "Yes" or "No" as to each.

a. 8/24/93 Act of Donation (2,146 shs.) (testimony only) a.__

b. 8/24/93 Act of Donation (2,044 shs.) (PX 2387) b.__

c. 8/25/93 Credit Sale of Stock (35,466 shs.) (PX 2361) c.__

d. 8/25/93 GRAT (47,288 shs.) (PX 2785) d.__

e. 8/25/93 Agreement (14,056 shs.) (PX 2117) e.__

Go to Question No. 51.

If you have answered:

"No" to Question No. 13 or "Yes" to Question No. 14; or

"Yes" to Question No. 35 or "Yes" to Question No. 36, or

"Yes" to Question No. 40; or

"Yes" to Question No. 42,

then answer the following Question No. 51. Otherwise, do not answer Question No. 51

QUESTION NO. 51

Did **E. Pierce Marshall** comply with his fiduciary duties to **J. Howard Marshall, II** and/or the **J. Howard Marshall, II Living Trust** with regard to any of the following transactions:

You are instructed as Trustee of the Living Trust and as attorney in fact, **E. Pierce Marshall** owed **J. Howard Marshall II** a fiduciary duty. To prove he complied with his duty, **Pierce Marshall** must show:

a. The transactions in question were fair and equitable to **J. Howard Marshall, II**.

b. **Pierce Marshall** made reasonable use of the confidence that **J. Howard Marshall II** placed in him;

c. **E. Pierce Marshall** acted in the utmost good faith and failed to ~~failed to exercise~~ exercised most scrupulous honesty toward **Howard Marshall II**;

d. **E. Pierce Marshall** placed the interests of **J. Howard Marshall II** before his own, did not use the advantage of his position to gain a benefit for himself at the expense of **J. Howard Marshall II**, and did not place himself in any position where his self-interest might conflict with his obligations as a fiduciary; and

e. **E. Pierce Marshall** fully and fairly disclosed all important information to **J. Howard Marshall II** concerning the transactions.

Answer "Yes" or "No" as to each:

a. 12/28/94 Renunciation (PX 230a) a.___

b. 5/26/95 Sale for Private Annuity (63,051 shs.) (PX 1354) b.___

c. 5/26/95 Sale (47,288 shs.) (PX 2368) c.___

Go to Question No. 52.

If you have answered Question No. 40 "Yes", then answer the following Question No. 52. Otherwise, do not answer Question No. 52.

QUESTION NO. 52

Did **J. Howard Marshall, II** repudiate the agreement you have found in Question No. 39 with **J. Howard Marshall, III**?

A party repudiates an agreement when he indicates, by his words or actions, that he is not going to perform his obligations under the agreement in the future, showing a fixed intention to abandon, renounce and refuse to perform the agreement. For repudiation to be effective, it must be adopted by the non-repudiating party.

Answer "Yes" or "No"

Answer: _____

Go to Question No. 53.

If you have answered "Yes" to Question No. 40 or Question No. 52, then answer the following Question No. 53. Otherwise, do not answer Question No. 53.

QUESTION NO. 53

On what date did **J. Howard Marshall, III**, discover, or should he have discovered in the exercise of ordinary diligence, that **J. Howard Marshall, II** had repudiated or had failed to comply with the agreement?

Answer by stating a date:

Answer: _____

Go to Question No. 54.

If you have answered "Yes" to Question No. 45, then answer the following Question No. 54. Otherwise, do not answer Question No. 54.

QUESTION NO. 54

On what date did **J. Howard Marshall, III** discover or should he have discovered in the exercise of ordinary diligence, that **Pierce Marshall** tortiously interfered with a gift or inheritance to him from **J. Howard Marshall, II**?

Answer by stating the date:

Answer: _____

Go to Question No. 55.

If you have answered "Yes" to Question No. 44, then answer the following Question No. 55. Otherwise, do not answer Question No. 55.

QUESTION NO. 55

On what date did **J. Howard Marshall, III** discover or should he have discovered in the exercise of ordinary diligence, that **Pierce Marshall** tortiously interfered with the agreement between him and **J. Howard Marshall, II**?

Answer by stating the date:

Answer: _____

Go to Question No. 56.

If yon have answered "Yes" to Question No. 42, then answer the following Question No. 56. Otherwise, do not answer Question No. 56.

QUESTION NO. 56

On what date did **J. Howard Marshall, III** discover, or should he have discovered in the exercise of ordinary diligence, that **J. Howard Marshall, II** had committed fraud against him?

Answer by stating the date:

Answer: _____

Go to Question No. 57.

QUESTION NO. 57

Do you find that **Pierce Marshall** acted in good faith and with just cause in defending **J. Howard Marshall II**'s December 22, 1992 Last Will for the purpose of having the Will admitted to probate?

The proponent of a will acts "in good faith and with just cause" if he acts under an honest and reasonable belief that the will is valid.

Answer "Yes" or "No."

Answer: Y

If you have answered "Yes" to Question No. 57, then go to Question No. 58. Otherwise, go to Question No. 59.

If your answer to Question No. 57 is "Yes", then answer the following Question No. 58. Otherwise, do not answer Question No. 58.

QUESTION NO. 58

What sum of money, if any, do you find from a preponderance of the evidence to be the necessary expenses and disbursements, including reasonable attorneys' fees, expenses and costs including fees paid to expert witnesses, incurred by **Pierce Marshall** in defending **J. Howard Marshall, II**'s December 22, 1992 Will for the purpose of having the Will admitted to probate?

In answering this question, you may consider the following factors as guides for determining a reasonable attorney's fee:

a. time and labor required;

b. the novelty and difficulty of the questions involved;

c. the requisite skills to perform the legal services properly;

d. the fee customarily charged in Harris County for similar legal services;

e. the experience, reputation, and ability of the lawyers performing the services; and

f. the nature of the fee arrangement between the party and their counsel.

Answer in dollars and cents, if any, for each of the following:

1. For legal services rendered for trial? 833K

2. For legal services on appeal to the Court of Appeals? 400K

3. For legal services on appeal to the Texas Supreme Court 89K

Go to Question No. 59.

QUESTION NO. 59

Do you find that trustees **Finley Hilliard** and **Ken Farrar** acted in good faith and with just cause in defending **J. Howard Marshall II**'s December 22, 1992 Will for the purpose of having the Will admitted to probate?

The proponent of a will acts "in good faith and with just cause" if he acts under an honest and reasonable belief that the will is valid.

Answer "Yes" or "No".

Answer: Y

If you answered "Yes" to Question No. 59, go to Question No. 60. Otherwise, go to Question No. 61.

If your answer is "Yes" to Question No. 59, then answer the following Question No. 60. Otherwise, do not answer Question No. 60.

QUESTION NO. 60

What sum of money, if any, do you find from a preponderance of the evidence to be necessary expenses and disbursements, including reasonable attorneys' fees, expenses and costs including fees paid to expert witnesses, incurred by trustees **Finley Hilliard** and **Ken Farrar** in defending **J. Howard Marshall, II**'s December 22, 1992 Will for the purpose of having the Will admitted to probate?

In answering this question, you may consider the following factors as guides for determining a reasonable attorney's fee:

a. time and labor required;

b. the novelty and difficulty of the questions involved;

c. The requisite skills to perform the legal services properly;

d. the fee customarily charged in Harris County for similar legal services;

e. the experience, reputation, and ability of the lawyers performing the services; and

f. the nature of the fee arrangement between the party and their counsel.

Answer in dollars and cents, if any, for each of the following:

1. For legal services rendered for trial? $ 147,500

2. For legal services on appeal to the Court of Appeals? $ 200,000

3. For legal services on appeal to the Texas Supreme Court $ 44,500

Go to Question No. 61.

QUESTION NO. 61

What sum of money, if any, do you find from a preponderance of the evidence to be the necessary expenses and disbursements, including reasonable attorneys' fees, expenses and costs; incurred by the Temporary Administrator, **Robert S. MacIntyre, Jr.**?

In answering this question, you may consider the following factors as guides for determining a reasonable attorney's fee:

a. time and labor required;

b. the novelty and difficulty of the questions involved;

c. the requisite skills to perform the legal services property;

d. the fee customarily charged in Harris county for similar legal services;

e. the experience, reputation, and ability of the lawyers performing the services; and

f. the nature of the fee arrangement between the party and their counsel.

Answer in dollars and cents, if any:

Answer: $1.2 mill.

Go to Question No. 62.

QUESTION NO. 62

Did **J. Howard Marshall, III** intentionally invade or interfere with a gift to the inheritance rights of any of the following parties without just cause or excuse?

Tortious interference with inheritance occurs when:

a. a party has an expectancy of inheritance or gift;

b. there is a reasonable certainty that the expectancy would have been realized, but for the interference;

c. the interference with the expectancy is intentional and without just or excuse;

d. the interference takes the form of conduct such as fraud, duress or undue influence; and

e. damages result from the interference.

Answer "Yes" or "No" for each party.

Answer for each:

1.	E. Pierce Marshall	Y
2.	Elaine Marshall	Y
3.	Preston Marshall	Y
4.	E. Pierce Marshall, Jr.	Y
5.	Marshall Museum and Library Trust	Y

If you answer "Yes" to any part of Question No. 62, go to Question No. 63. Otherwise, go to Question No. 66.

If your answer is "Yes" to any part of Question No. 62, then answer the same part of the following Question No. 63. Otherwise, do not answer Question No. 63.

QUESTION NO. 63

What sum of money, if paid now in cash, would fairly and reasonably compensate the following parties for any intentional interference found by you in answer to Question No. 66?

You may consider the following elements of damages and no others:

a. Actual pecuniary losses caused by the interference;

b. Consequential loss caused by the interference; and

c. Emotional distress reasonably expected to be caused by the interference.

Answer in dollars and cents, if any, for each party:

Answer:

1.	E. Pierce Marshall	$ 5.9 mil
2.	Elaine Marshall	$ 200K
3.	Preston Marshall	$ 200K
4.	E. Pierce Marshall, Jr.	$ 200K
5.	Marshall Museum and Library Trust	$ 5,400,000

Go to Question No. 64.

If you have answered "Yes" to any part of Question No. 62, then answer the same part following Question No. 64. Otherwise, do not answer Question No. 64.

QUESTION NO. 64

Do you find by clear and convincing evidence that the tortious interference with inheritance rights found by you in answer to Jury Question No. 67, if any, was committed by **J. Howard Marshall III** with malice?

"Malice" means:

(a) a specific intent by **J. Howard Marshall III** to cause substantial injury to **E. Pierce Marshall, Elaine Marshall, Preston Marshall, E. Pierce Marshall, Jr.**, or the **Marshall Museum and Library Trust**;

(b) an act or omission by **J. Howard Marshall, III**

(i) which, when viewed objectively from the standpoint of **J. Howard Marshall III** at the time of its occurrence, involved an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and

(ii) of which **J. Howard Marshall III** had actual subjective awareness of the risk involved, but nevertheless proceeded with conscious indifference to the rights, safety, or welfare of others.

Answer "Yes" or "No" for each party:

a.	E. Pierce Marshall	Y
b.	Elaine Marshall	Y
c.	Preston Marshall	Y
d.	E. Pierce Marshall, Jr.	Y
e.	Marshall Museum and Literary Trust	Y

If your answer is "Yes" to any part of Question No. 64, go to Question No. 65. Otherwise, go to Question No. 66.

If you have answered "Yes" to any part of Question No. 64, then answer the same part of following Question No. 65. Otherwise, do not answer Question No. 65.

QUESTION NO. 65

What sum of money, if any, should be awarded as exemplary damages to **E. Pierce Marshall, Elaine Marshall, Preston Marshall, E. Pierce Marshall, Jr.** or the **Marshall Museum and Library Trust** against **J. Howard Marshall, III** for the conduct found by you in Question No. 62.

"Exemplary damages" means an amount that you may in your discretion award as a penalty or by way of punishment.

Factors to consider in awarding exemplary damages, if any, are:

a) The nature of the wrong;

b) The character of the conduct involved;

c) The degree of culpability of the wrongdoer;

d) The situation and sensibilities of the parties concerned; and,

e) The extent to which such conduct offends a public sense of justice and propriety.

f) The size of an award needed to deter similar conduct in the future. Answer dollars and cents, if any, for each party:

a.	E. Pierce Marshall	$ 6 mil
b.	Elaine Marshall	$ 500K
c.	Preston Marshall	$ 200K
d.	E. Pierce Marshall, Jr.	$ 200K
e.	Marshall Museum and Literary Trust	$ 3,600,000

Go to Question No. 66.

QUESTION NO. 66

Do you find that **Vickie Lynn Marshall** did not have an agreement with **J. Howard Marshall, II**, that he would give her one-half of all of his property?

Answer "We do so find" or "We do not so find".

Answer: We do so find

Go to Question No. 67.

QUESTION NO. 67

Did **J. Howard Marshall, III** commit fraud against **Bettye B. Marshall**?

"Fraud" occurs when:

a. party makes a material misrepresentation;

b. the misrepresentation is made with the knowledge of its falsity or made recklessly without any knowledge of the truth and as a positive assertion;

c. the misrepresentation is made with the intention that it should be acted upon by the other party; and

d. the other party acts in reliance on the misrepresentation and thereby suffers injury.

"Misrepresentation" means a false statement of fact, or a promise of future performance made with an intent not to perform as promised.

"Fraud" also occurs when:

a. a party conceals or fails to disclose a material fact within the knowledge of that party;

b. the party knows that the other party is ignorant of the fact and does not have an equal opportunity to discover the truth;

c. the party intends to induce the other party to take some action by concealing or failing to disclose the fact; and,

d. the other party suffers injury, as a result of acting without knowledge of the undisclosed fact.

Answer "Yes" or "No."

Answer: Y

If you answer "Yes" to Question No. 67, then go to Question No. 68. Otherwise, go to Question No. 73.

If your answer is "Yes" to Question No. 67, then answer the following Question No. 68. Otherwise, do not answer Question No. 68.

QUESTION NO. 68

Did **J. Howard Marshall, III** fraudulently conceal his fraud until he filed this lawsuit?

Answer "Yes" or "No".

Answer: Y

If you answer "Yes" to Question No. 67, then go to Question No. 69. Otherwise, go to Question No. 73.

If your answer is "Yes" to Question No. 67, then answer the following Question No. 69. Otherwise, do not answer Question No. 69.

QUESTION NO. 69

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate the **Bettye B. Marshall Trusts** for the damages, if any, that resulted from the fraud that damaged **Bettye B. Marshall**?

Consider the following element of damages, if any, and none other:

> The difference, if any, between the value of the benefits to **Bettye B. Marshall** agreed to by the parties and the value of the benefits to **Bettye B. Marshall** actually provided by **J. Howard Marshall, II**.

Answer in dollars and cents, if any.

Answer: $4 mill

If your answer is "Yes" to Question No. 67, then go to Question No. 70. Otherwise, go to Question No. 73.

If your answer is "Yes" to Question No. 67, then answer the following Question No. 70. Otherwise, do not answer Question No. 70.

QUESTION NO. 70

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate the **Bettye B. Marshall Trusts** for the additional damages, if any, that were proximately caused by **Howard Marshall, III**'s fraud on **Bettye B. Marshall**?

Do not consider any amount that you have awarded for the fraud in a prior answer.

Answer in dollars and cents, if any.

Answer: 0

If your answer is "Yes" to Question No. 67, then go to Question No. 71. Otherwise, go to Question No. 73.

If you have answered "Yes" to Question No. 67, then answer the following Question No. 71. Otherwise, do not answer Question No. 71.

QUESTION NO. 71

Do you find by clear and convincing evidence that the fraud found by you in answer to Jury Question No. 67, if any, was committed by **J. Howard Marshall III** with malice?

"Malice" means:

(a) a specific intent by **J. Howard Marshall III** to cause substantial injury to **Bettye B. Marshall**;

(b) an act or omission by **J. Howard Marshall, III**

(i) which, when viewed objectively from the standpoint of **J. Howard Marshall III** at the time of its occurrence, involved an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and

(ii) of which **J. Howard Marshall III** had actual, subjective awareness of the risk involved, but nevertheless proceeded with conscious indifference to the rights, safety, or welfare of others.

Answer "Yes" or "No":

Betty B. Marshall Y

If your answer is "Yes" to Question No. 71, go to Question No. 72. Otherwise, go to Question No. 73.

If you have answered "Yes" to Question No. 71, then answer the following Question No. 72. Otherwise, do not answer Question No. 72.

QUESTION NO. 72

What sum of money, if any, should be awarded as exemplary damages to **Bettye B. Marshall Trust** against **J. Howard Marshall, III** for the conduct found by you in Question No. 67.

"Exemplary damages" means an amount that you may in your discretion award as a penalty or by way of punishment.

Factors to consider in awarding exemplary damages, if any, are:

a) The nature of the wrong;

b) The character of the conduct involved;

c) The degree of culpability of the wrongdoer;

d) The situation and sensibilities of the parties concerned; and,

e) The extent to which such conduct offends a public sense of justice and propriety.

f) The size of an award needed to deter similar conduct in the future.

g) The net worth of J. Howard Marshall, III.

Answer dollars and cents, if any:

Betty B. Marshall $ 6 mill.

Go to Question No. 73.

QUESTION NO. 73

Did **J. Howard Marshall III** sell stock to **Bettye B. Marshall** by means of an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading?

Answer "Yes" or "No".

Answer: N

If your answer to Question No. 73 is "Yes", go to Question No. 74. Otherwise, go to Question No. 76.

If your answer is "Yes" to Question No. 73, then answer the following Question No. 74. Otherwise, do not answer Question No. 74.

QUESTION NO. 74

What amount of money did **Bettye B. Marshall** pay to **J. Howard Marshall, III** for the stock?

Answer in dollars and cents, if any.

Answer: $_____

If your answer to Question No. 73 is "Yes", go to Question No. 75. Otherwise, go to Question No. 76.

If your answer is "Yes" to Question No. 73, then answer the following Question No. 75. Otherwise, do not answer Question No. 75.

QUESTION NO. 75

What was the value of the stock purchased from **J. Howard Marshall, III** at the time **J. Howard Marshall, II** and **Bettye B. Marshall** disposed of it?

Answer in dollars and cents, if any.

Answer: $_____

Go to Question No. 76.

QUESTION NO. 76

Do you find that **Betty B. Marshall** or **E. Pierce Marshall**, as Trustee of the **Bettye Marshall Trust**, unreasonably delayed in asserting their claims against **J. Howard Marshall, III**?

A party unreasonably delays asserting his rights if the delay causes of good faith change of position by the other party to his detriment.

Answer "Yes" or "No."

Answer: ___N___

Go to Question No. 77.

QUESTION NO. 77

What is the earliest date upon which either **Bettye B. Marshall** or **E. Pierce Marshall, Trustee** of the **Bettye B. Marshall Trust**, discovered or should have discovered, in the exercise of ordinary diligence, that **J. Howard Marshall, III** had committed securities fraud against **Bettye B. Marshall**?

Answer by stating the date.

Answer: Jan. 96

Go to Question No. 78.

QUESTION NO. 78

Did **J. Howard Marshall III** waive his claims, if any, against **J. Howard Marshall II** after December 2, 1980?

"Waiver" means the intentional surrender of a known right or intention [sic] conduct inconsistent with claiming that right if made after receipt of full disclosure of all material information.

Answer "Yes" or "No".

Answer: Y

Go to Question No. 79.

QUESTION NO. 79

Do you find that **J. Howard Marshall III** is estopped from asserting the claims he has made against **J. Howard Marshall II** or **E. Pierce Marshall**?

A person is estopped if, after full disclosure of all material facts, he acts or fails to act with the intention that another rely on such action or inaction, and if such other person does in good faith rely to his detriment on the acts or inactions of the first person.

Answer "Yes" or "No" as to each party:

Answer:

Claims against **J. Howard Marshall II** ___Y___

Claims against **E. Pierce Marshall** ___Y___

Go to Question No. 80.

QUESTION NO. 80

Do you find that **J. Howard Marshall III** unreasonably delayed in asserting his claims against **J. Howard Marshall II** or **E. Pierce Marshall**?

A party unreasonably delays asserting his rights if the delay causes a good faith change of position by the other party to his detriment.

Answer "Yes" or "No" as to each party:

Answer:

Claims against **J. Howard Marshall II** ___Y___

Claims against **E. Pierce Marshall** ___Y___

Go to Question No. 81.

QUESTION NO. 81

Do you find that in making his claims against **J. Howard Marshall II** and **E. Pierce Marshall**, **J. Howard Marshall III** has acted with unclean hands?

A person acts with unclean hands if he attempts to obtain the benefit of the results of his own fraud, dereliction of duty, violation of law, wrongful conduct or other inequitable conduct in the transaction in question.

Answer "Yes" or "No."

Answer: Y

After you retire to the jury room, you will select your own presiding juror. The first thing the presiding juror will do is to have this complete charge read aloud and then you will deliberate upon your answers to the question asked.

It is the duty of the presiding juror –

1. To preside during your deliberations.
2. To see that your deliberations are conducted in an orderly manner and in accordance with the instructions in this charge.
3. To write out and hand to the bailiff any communications concerning the case that you desire to have delivered to the judge.
4. To vote on the questions.
5. To write your answers to the questions in the spaces provided, and
6. To certify to your verdict in the space provided for the presiding juror's signature or to obtain the signatures of all the jurors who agree with the verdict if your verdict is less than unanimous.

You should not discuss the case with anyone, not even with other members of the jury, unless all of you are present and assembled in the jury room. Should anyone attempt to talk to you about the case before the verdict is

returned, whether at the courthouse, at your home, or elsewhere, please inform the Judge of this fact.

When you have answered all the questions you are required to answer under the instructions of the Judge and your presiding juror has placed your answers in the spaces provided and signed the verdict as presiding juror or obtained the signatures, you will inform the bailiff at the door of the jury room that you have reached a verdict, and then you will return into Court with your verdict.

/s/ Mike Wood
JUDGE PRESIDING

CERTIFICATE

We, the jury, have answered the above and foregoing questions as herein indicated, and herewith return same into Court as our verdict.

(To be signed by the presiding juror if unanimous.)

/s/ [Illegible]
PRESIDING JUROR

(To be signed by those rendering the verdict if not unanimous.)

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

RECORDERS MEMORANDUM

ALL [Illegible], ADDITIONS, AND [Illegible] WERE PRESENT AT THE TIME THE INSTRUMENT WAS FILED, AND RECORDED.

NO. 276,815-402

ESTATE OF J. HOWARD MARSHALL, II, DECEASED	§	**IN THE PROBATE COURT**
J. HOWARD MARSHALL, III, *et al.*	§	
Plaintiffs	§	
v.	§	**NUMBER TWO (2) OF**
ROBERT S. MACINTYRE, JR. AS TEMPORARY ADMINISTRATOR OF THE ESTATE OF J. HOWARD MARSHALL, II, *et al.*	§	
Defendants	§	**HARRIS COUNTY, TEXAS**

SECOND MODIFIED FINAL JUDGMENT

(Filed Dec. 7, 2001)

BE IT REMEMBERED that on the 18th day of September 2000, came onto be heard in due order and time the above-styled and numbered cause. The Court received the jury's verdict herein on the 7th day of March 2001, and the Court here and now renders its judgment on the verdict pursuant to TEX. R. CIV. P. 300.

1. APPEARANCES

1.1. The plaintiff and counterdefendant J. HOWARD MARSHALL III appeared in person and by attorney of record and announced ready for trial on his Fourth Amended Consolidated Petition as supplemented by his Second Amended Supplement to Fourth Amended Consolidated Petition and his Response to Counterclaims and Claim for Indemnity. The plaintiff and counterdefendant

VICKIE LYNN MARSHALL appeared in person and by attorney of record and announced ready for trial on her Fifth Amended Consolidated Petition and Will Contest.

1.2. The defendant ROBERT S. MACINTYRE JR. appeared in person and as the court-appointed temporary administrator for the Estate of J. HOWARD MARSHALL II, deceased, and announced ready for trial on his Amended Original Answer to the Consolidated Actions of Howard Marshall, III and Vickie Marshall.

1.3.1. The defendant and counterclaimant E. PIERCE MARSHALL, individually, as will proponent, as co-trustee of the Marshall Grandchildren's Trust for the Benefit of E. Pierce Marshall Jr., as co-trustee of the Marshall Grandchildren's Trust for the Benefit of Preston Marshall, and as Trustee of the Marshall Petroleum, Inc., Stock Holding Trust, appeared in person and by attorney of record and announced ready for trial on his Second Amended Original Answer to Plaintiffs' Pleadings, his Affirmative Claims, and his Affirmative Clams against Vickie Marshall.

1.3.2. The defendant and counterclaimant ELAINE MARSHALL, individually, as co-trustee of the Marshall Grandchildren's Trust for the Benefit of E. Pierce Marshall Jr., and as co-trustee of the Marshall Grandchildren's Trust for the Benefit of Preston Marshall, appeared in person and by attorney of record and announced ready for trial on her Second Amended Original Answer to Plaintiffs' Pleadings, her Affirmative Claims, and her Affirmative Claims against Vickie Marshall.

1.3.3. The defendant and counterclaimant E. PIERCE MARSHALL JR. appeared in person and by attorney of record and announced ready for trial on his Second Amended Original Answer to Plaintiffs' Pleadings,

his Affirmative Claims, and his Affirmative Claims against Vickie Marshall.

1.3.4. The defendant and counterclaimant PRESTON MARSHALL appeared in person and by attorney of record and announced ready far trial on his Second Amended Original Answer to Plaintiffs' Pleadings, his Affirmative Claims, and his Affirmative Claims against Vickie Marshall.

1.3.5. The defendants and counterplaintiff's named in this Paragraph 1.3. are sometimes collectively referred to in this judgment as the "Marshall Family Defendants."

1.4. The defendants MARSHALL PETROLEUM, INC., and TROF, INC., appeared by duly authorized representative and by attorney of record and announced ready for trial on their First Amended Answer to Plaintiffs' Petitions and Affirmative Claims.

1.5. The defendant and counter-claimant FINLEY HILLIARD individually, as trustee of the J. Howard Marshall, II, Living Trust; as trustee of the Marshall Petroleum, Inc., Stock Holding Trust; as trustee of the Grantor Retained Annuity Trust; as trustee of the J. Howard Marshall Charitable Lead Trust; as trustee of the J. Howard Marshall, II, Liquidating Trust Number Two; and as trustee of the J. Howard Marshall, Family Trust, appeared in person and by attorney of record and announced ready for trial on his First Amended Answer to Plaintiffs' Claims and Affirmative Claims.

1.6. The defendant and counterclaimant KEN FARRAR, as trustee of the J. Howard Marshall, II, Living Trust: as trustee of the J. Howard Marshall, II, Liquidating Trust Number One; and as trustee of the J. Howard

Marshall, II, Family Trust, appeared in person and by attorney of record and announced ready for trial on his First Amended Answer to Plaintiffs' Claims and Affirmative Claims.

1.7. The defendants HARVEY R. SORENSEN and FOULSTON & SIEFKIN, L.L.P., appeared in person and by attorney of record and announced ready for trial on their Second Amended Answer.

1.8. The defendant ELEANOR PIERCE STEVENS, acting in her capacity as successor co-trustee of the Marshall Petroleum, Inc., Stock Holding Trust, appeared by attorney of record and announced ready for trial on her Original Answer.

1.9. The defendant and counterclaimant E. PIERCE MARSHALL, acting as trustee of the Marshall Museum and Library Trust, appeared in person and by attorney of record and announced ready for trial on his Consolidated Amended Answer and Affirmative Defenses to Plaintiffs' Petitions.

1.10. The defendant and counterclaimant DR. STEPHEN COOK, who is sometimes improperly named as Dr. Steven Cook, acting as trustee of the Marshall Museum and Library Trust, appeared in person and by attorney of record and announced ready for trial on his First Amended Consolidated Counterclaims.

1.11.1. The defendant and counterclaimant E. PIERCE MARSHALL, acting as trustee of the Bettye B. Marshall Living Trust, which is sometimes referred to as the Bettye B. Marshall Estate Trust, appeared in person and by attorney of record and announced ready for trial on his Consolidated Amended Answer and Affirmative Defenses

to Plaintiffs' Petitions and First Amended Consolidated Counterclaims.

1.11.2. The defendant and counterclaimant E. PIERCE MARSHALL, acting as trustee of the J. Howard Marshall, II, Marital Trust Number Two, appeared in person and by attorney of record and announced ready for trial on his Amended Answer and Counterclaim.

1.11.3. The defendant and counterclaimant E. PIERCE MARSHALL, acting as trustee of the E. Pierce Marshall Family Trust created under the Bettye B. Marshall Living Trust Indenture dated October 30, 1990, appeared in person and by attorney of record and announced ready for trial on his Amended Answer and Counterclaim.

1.11.4. The defendants and counterplaintiffs named in this Paragraph 1.11. are sometimes collectively referred to in this judgment as the "Bettye B. Marshall Trusts."

2. DISPOSITIONS PRIOR TO TRIAL

2.1. Prior to trial and during the trial, the Court was informed of a written settlement agreement between the plaintiff VICKIE LYNN MARSHALL and the defendant EDWIN K. HUNTER, in which these two parties agreed to the settlement of any and all claims by VICKIE LYNN MARSHALL against EDWIN K. HUNTER. The Court here and now renders judgment of dismissal with prejudice of all claims asserted by VICKIE LYNN MARSHALL against EDWIN K. HUNTER.

2.2. Prior to and during the trial, the Court was informed of a written settlement agreement between the plaintiff J. HOWARD MARSHALL III and the defendants

FINLEY HILLIARD, individually, and KEN FARRAR, individually, in which these parties agreed to the settlement of any and all claims against FINLEY HILLIARD, individually, and KEN FARRAR, individually. The Court here and now renders judgment of dismissal with prejudice of all claims asserted by J. HOWARD MARSHALL III against FINLEY HILLIARD, individually, and KEN FARRAR individually.

2.2.1. Prior to trial and during the trial, the Court was informed of a written settlement agreement between the plaintiff J. HOWARD MARSHALL III and defendants FINLEY HILLIARD, as trustee, KEN FARRAR, as trustee, and MILFORD, HILLIARD AND FARRAR, P.C., in which these parties agreed to the settlement of any and all claims by J. HOWARD MARSHALL III against FINLEY HILLIARD, as trustee, KEN FARRAR, as trustee, and MILFORD, HILLIARD AND FARRAR, P.C., on account of or arising out of (a) any and all acts of misfeasance or nonfeasance by them; (b) all acts or omissions, whether such acts or omissions constitute any form of negligence or any form of intentional conduct by them; (c) any claim for breach of any duty or obligation to J. HOWARD MARSHAL III, or to any other person or entity for which J. HOWARD MARSHALL III might assert a claim against them; (d) any claim for error or omission in the rendering of or failure to render any services as trustees or accountants by them; (e) any claim for breach of trust or fiduciary duty by them to any person, entity, or trust. The parties expressly agreed that J. HOWARD MARSHALL III could maintain and continue to assert claims against FINLEY HILLIARD, as trustee, and KEN FARRAR, as trustee, but only because, as trustees, they are necessary parties to claims or causes of action seeking to establish a right in or

to the assets of the trusts for which they are trustees. The Court here and now renders judgment of dismissal with prejudice of all claims asserted by J. HOWARD MARSHALL III against FINLEY HILLIARD, as trustee, KEN FARRAR, as trustee, and MILFORD, HILLIARD AND FARRAR, P.C., because of any act or failure to act on the part of FINLEY HILLIARD, as trustee, or KEN FARRAR, as trustee.

2.3. Prior to the cause being called to trial, the defendants HARVEY SORENSEN, individually, and FOULSTON & SIEFKIN, L.L.P., moved for summary judgment that the plaintiff J. HOWARD MARSHALL III take nothing on his claims asserted in this action arising out of or relating to ELEANOR PIERCE STEVENS' estate, her estate planning, or her property. The Court, having received the summary judgment evidence and having heard the arguments of counsel, rendered an interlocutory judgment on the 7th day of June 1999 that J. HOWARD MARSHALL III take nothing on all claims asserted in this matter arising out of or related to the estate, the estate planning or the property of ELEANOR PIERCE STEVENS. The Court here and now makes its prior interlocutory order FINAL,

2.4. Prior to the cause being called to trial, the intervenor ELEANOR PIERCE STEVENS moved for summary judgment that the plaintiff J. HOWARD MARSHALL III take nothing on his claims asserted in this action arising out of or relating to ELEANOR PIERCE STEVENS' estate, her estate planning, or her property. The Court, having received the summary judgment evidence and having heard the argument of counsel, rendered an interlocutory judgment on the 9th day of August 1999 that J. HOWARD MARSHALL III take nothing on all

claims asserted in this matter arising out of or related to the estate, the estate planning, or the property of ELEANOR PIERCE STEVENS. The Court here and now makes its prior interlocutory order FINAL.

2.5. Prior to the cause being called to trial, the defendant EDWIN K. HUNTER moved for summary judgment against the plaintiff J. HOWARD MARSHALL III. The Court, having received the summary judgment evidence and having heard the argument of counsel, rendered an interlocutory judgment on the 10th day of November 1999 that J. HOWARD MARSHALL III take nothing on all claims asserted in this action against EDWIN K. HUNTER. Prior to trial and during the trial, the Court was informed of a written settlement agreement between the plaintiff J. HOWARD MARSHALL III and the defendant EDWIN K. HUNTER, in which these two parties agreed to the entry of a take-nothing judgment in favor of EDWIN K. HUNTER. The Court here and now makes its prior interlocutory order FINAL and renders judgment in accordance with the settlement agreement.

2.6. Prior to the cause being called to trial, the Marshall Family Defendants, including E. PIERCE MARSHALL, a resident of Dallas County, Texas, sought probate of a certain instrument in writing dated the 11th day of June 1993, said original instrument being on file herein and purporting and alleged to be the Codicil to Last Will and Testament of J. Howard Marshall, II. In addition, the Marshall Family Defendants, including E. PIERCE MARSHALL, sought probate of a certain instrument in writing dated the 22nd day of December 1992, said original instrument being on file herein and purporting and alleged to be the Last Will and Testament of J. Howard

Marshall, II. In connection with the application for probate of these instruments, the Marshall Family Defendants named and provided notice to all interested parties, including VICKIE LYNN MARSHALL. Pursuant to a motion for summary judgment filed on behalf of the Marshall Family Defendants that was granted on the 24th day of February 2000, the Court decreed the following: (1) that J. HOWARD MARSHALL II died on the 4th day of August 1995; (2) that the purported Codicil to Last Will and Testament of J. Howard Marshall, II, dated on the 11th day of June 1993, and the purported Last Will and Testament of J. Howard Marshall, II, dated the 22nd day of December 1992, were submitted for probate prior to the passage of four (4) years of time since the date of testator's death, (3) that the Court has jurisdiction and venue over the Estate of J. HOWARD MARSHALL II, deceased, this probate proceeding, and the subject matter of this proceeding ancillary to probate; (4) that all citations and processes required by law for probate were duly issued, served, and returned in the manner and for the length of time required by law; (5) that E. PIERCE MARSHALL is named as executor in said documents; (6) that J. HOWARD MARSHALL II was over ninety (90) years of age at the time of his death; (7) that the said purported testamentary documents were executed by J. HOWARD MARSHALL II and the witnesses thereto with the formalities and solemnities and under the circumstances required by law to make them a valid codicil and valid will; and (8) that the said documents had not been revoked by J. HOWARD MARSHALL II.

2.7. Prior to this cause being called to trial, the Marshall Family Defendants moved for summary judgment seeking a decree concerning certain aspects of the J.

Howard Marshall, II, Living Trust, formed originally pursuant to the Living Trust Indenture dated on the 1st day of September 1982. On the 24th day of February 2000, the Court rendered its partial summary judgment regarding this trust and decreed as follows: (1) that the J. Howard Marshall, II, Living Trust was executed and sufficiently funded by J. HOWARD MARSHALL II in 1982 under the applicable Texas law; (2) that the change of sites of the J. Howard Marshall, II, Living Trust to Louisiana did not make the J. Howard Marshall, II, Living Trust invalid; (3) that the provisions of the J. Howard Marshall, II, Living Trust do not violate the laws of the State of Louisiana; and (4) that, in any event, the invalidity of certain provisions of the J. Howard Marshall, II, Living Trust as alleged by J. HOWARD MARSHALL III and VICKIE LYNN MARSHALL is not a basis for Invalidating the entire J. Howard Marshall, II, Living Trust. It appears to the Court that its prior interlocutory order should be, and hereby is, made FINAL.

2.8. The defendants CHARLES KOCH and DON CORDES moved for summary judgment against plaintiff, J. HOWARD MARSHALL III; and the Court, having received the summary judgment evidence and having heard the argument of counsel, rendered summery judgment in favor of CHARLES KOCH and DON CORDES on the 12th day of September 2000. It appears to the Court that its prior interlocutory order should be, and hereby is, made FINAL.

2.9. Prior to this cause being called to trial, the defendant KOCH INDUSTRIES, Inc. moved for summary judgment against J. HOWARD MARSHALL III; and the Court, having received the summary judgment evidence and having heard the argument of counsel, rendered an

interlocutory take-nothing judgment against J. HOWARD MARSHALL III on the 6th day of December 1999. The Court here and now makes its prior interlocutory order FINAL.

3. TRIAL OF THE CASE

3.1. This Court has exclusive and dominant jurisdiction over (1) all claims regarding the property owned by J. Howard Marshall II; (2) the Last Will and Testament of J. Howard Marshall II, dated the 22nd day of December 1992; (3) the Codicil to Last Will and Testament of J. Howard Marshall II, dated the 11th day of June 1993; (4) the Amended and Restated Living Trust Indenture dated the 13th day of July 1994; (5) all prior wills, codicils, and trusts executed by J. Howard Marshall II; (6) all affirmative claims and all filed and possible compulsory counterclaims raised by J. HOWARD MARSHALL III and VICKIE LYNN MARSHALL; and (7) all plaintiffs' and defendants' claims raised and that could have been raised against the Estate of J. Howard Marshall II, concerning the making of any *inter vivos* or testamentary gift or transfer by J. Howard Marshall II of any of his property.

3.2. At the conclusion of the evidence presented in the case-in-chief of the plaintiff and counterdefendant J. HOWARD MARSHALL III, the defendants HARVEY R. SORENSEN and FOULSTON & SIEFKIN, L.L.P., moved pursuant to TEX. R. CIV. P. 268 for a directed verdict. On the 17th day of January 2001, the Court, having considered the motion, the argument of counsel, and the record, rendered judgment as a matter of law in favor of HARVEY SORENSEN and FOULSTON & SIEFKIN, L.L.P., for the reason that there was no evidence of probative force to

support any material issue against HARVEY SORENSEN and FOULSTON & SIEFKIN, L.L.P., and for the reason that HARVEY SORENSEN and FOULSTON & SIFFKIN, L.L.P., established their right to judgment as a matter of law.

3.2.1. It is therefore ORDERED, ADJUDGED, and DECREED by the Court that Plaintiff J. HOWARD MARSHALL III take nothing by his suit against HARVEY SORENSEN and FOULSTON & SIEFKIN, L.L.P.

3.3. At the conclusion of all the evidence, the Marshall Family Defendants, acting as will proponents, moved for a directed verdict on the issue of nonrevocation of the Last Will and Testament of J. Howard Marshall, II, dated the 22nd day of December 1992. The Court, having considered the motion, rendered judgment as a matter of law in favor of the Marshall Family Defendants for the reason that nonrevocation of this instrument was established as a matter of law.

3.4. On the 5th day of January 2001, VICKIE LYNN MARSHALL filed of record in this Court a voluntary nonsuit of all claims against all defendants. Thereafter, VICKIE LYNN MARSHALL brought no additional claims against any party in this Court. Further, the Marshall Family Defendants, the Bettye B. Marshall Trusts, and Dr. Stephen Cook, trustee of the Marshall Museum and Library Trust announced on the record to the Court that, pursuant to an order of the Honorable Samuel L. Bufford, Bankruptcy Court of the Central District of California, in which that Bankruptcy Court ruled it would bring contempt proceedings against these defendants if they proceeded with their counterclaims for damages is this Court, the Marshall Family Defendants, the Bettye B. Marshall

Trusts, and Dr. Stephen Cook, as trustee of the Marshall Museum and Library Trust, requested and received leave of Court, to amend their counterclaims and to nonsuit without Prejudice all affirmative claims against VICKIE LYNN MARSHALL. This action left pending their claims for declaratory judgment, sanctions pursuant to TEX. R. CIV. P. 13 and TEX. CIV. PRAC. & REM. CODE ANN. §§ 10.001-.006 (Vernon Supp. 2001), the application for probate of the Codicil to the Last Will and Testament of J. Howard Marshall II dated the 11th day of June 1993, and the application for probate of the Last Will and Testament of J. Howard Marshall, II, dated the 22nd day of December 1992, in which VICKIE LYNN MARSHALL was named as, and appeared as, an interested party. VICKIE LYNN MARSHALL remained a counterdefendant for purposes of the declaratory judgment claim and the TEX. R. CIV. P. 13 sanctions claim.

3.5. A jury having been previously demanded in due time, there came a jury of twelve good and lawful men and women, who, being duly impaneled and sworn, heard the evidence and the argument of counsel. On the 1st day of March 2001, the Court submitted the questions of fact in the cause to the jury. On the 7th day of March 2001, the jurors on their oaths did return their unanimous verdict, in response to the questions set forth on Exhibit A attached hereto and made a part hereof for all purposes.:

3.6. The jury's findings were received by the Court as a verdict and, upon motion made, were accepted, filed, and entered of record on the minutes of the Court. Because it appears to the Court that the verdict of the jury was in favor of all defendants and against the plaintiffs and counterdefendants J. HOWARD MARSHALL III and VICKIE LYNN MARSHALL, judgment should be, and

here and now is, rendered in part on the verdict in favor of the defendants, will proponents, and counterplaintiffs.

3.7. The Court finds that its prior interlocutory order with respect to all issues regarding admission of the Last Will and Testament of J. Howard Marshall, II, dated the 22nd day of December 1992, and the Codicil to Last Will and Testament of J. Howard Marshall, II, dated the 11th day of June 1993, should be, and the same is, made FINAL.

3.8. The Court further finds, after the Court's consideration of the jury's findings on testamentary capacity and undue influence, that the Last Will and Testament of J. Howard Marshall II, dated the 22nd day of December 1992, and the Codicil to Last Will and Testament of J. Howard Marshall II, dated the 11th day of June 1993, are genuine, were validly executed by J. Howard Marshall II as a competent adult possessing sound mind, mental capacity, and testamentary capacity; were not the product of undue influence or any other tortious act, and are otherwise qualified in all respects for admission to probate by this Court.

3.9. The Court further finds that E. PIERCE MARSHALL is entitled by law to letters testamentary, is willing to accept the trust and to qualify according to law, and is not disqualified from accepting such letters.

3.10. The Court further finds that the purported Last Will and Testament of J. Howard Marshall, II, dated the 22nd day of December 1992, provides that no other action shall be required or had in the courts in relation to the settlement of such estate other than the probating and recording of such Last Will.

3.11. IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED by the Court that the contest by J. HOWARD MARSHALL III of the Codicil to Last Will and Testament of J. Howard Marshall, II, dated on the 11th day of June 1993, and the contest of the alleged Last Will and Testament of J. Howard Marshall, II, dated the 22nd day of December 1992, are hereby DENIED AND OVERRULED;

3.12 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by the Court that the Codicil to Last Will and Testament of J. Howard Marshall, II dated the 11th day of June 1993 and the Last Will and Testament of J. Howard Marshall, II dated the 22nd day of December 1992, be and the same hereby are, admitted to probate and that the Clerk of this Court is ORDERED to record said Codicil and Will together with the previously filed Application for Probate in the Minutes of this Court;

3.13. IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by the Court that no bond or other security is required and that, upon taking and filing the oath required by law, letters testamentary shall be issued to E. PIERCE MARSHALL, who is hereby APPOINTED by the Court as Independent Executor of J. Howard Marshall II's will and estate, and that no other actions shall be had in this Court other than the return of the inventory, appraisement, and list of claims as required by law;

3.14. IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by the Court that no interested person has applied for the appointment of appraiser and none is deemed necessary by the Court; and

3.15. IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by the Court that plaintiff J. HOWARD MARSHALL III take nothing by this suit from any of the following persons and/or legal entities:

1. E. Pierce Marshall;
2. Elaine Marshall;
3. E. Pierce Marshall Jr.;
4. Preston Marshall;
5. Finley Hilliard;
6. Robert S. MacIntyre Jr. as the court-appointed temporary administrator of the Estate of J. Howard Marshall II;
7. E. Pierce Marshall as co-trustee of the Marshall Grandchildren's Trust for the Benefit of E. Pierce Marshall Jr.;
8. E. Pierce Marshall as co-trustee of the Marshall Grandchildren's Trust for the Benefit of Preston Marshall;
9. E. Pierce Marshall as trustee of the Marshall Petroleum, Inc., Stock Holding Trust;
10. E. Pierce Marshall as trustee of the Marshall Museum and Library Trust;
11. E. Pierce Marshall as trustee of the Bettye B. Marshall Estate Trust;
12. E. Pierce Marshall as trustee of the J. Howard Marshall, II, Marital Trust Number Two;
13. E. Pierce Marshall as trustee of the E. Pierce Marshall Family Trust created under the Bettye B. Marshall Living Trust Indenture dated October 30, 1990;

14. Finley Hilliard as trustee of the J. Howard Marshall, II, Living Trust;

15. Finley Hilliard as trustee of the Marshall Petroleum, Inc., Stock Holding Trust;

16. Finley Hilliard as trustee of the Grantor Retained Annuity Trust;

17. Finley Hilliard as trustee of the J. Howard Marshall Charitable Lead Trust;

18. Finley Hilliard as trustee of the J. Howard Marshall, II, Liquidating Trust Number Two;

19. Finley Hilliard as trustee of the J. Howard Marshall II Family Trust;

20. Ken Farrar as trustee of the J. Howard Marshall, II, Living Trust;

21. Ken Farrar as trustee of the J. Howard Marshall, II, Liquidating Trust Number One;

22. Ken Farrar as trustee of the J. Howard Marshall, II, Family Trust;

23. Elaine Marshall as co-trustee of the Marshall Grandchildren's Trust for the Benefit of E. Pierce Marshall Jr.;

24. Elaine Marshall as co-trustee of the Marshall Grandchildren's Trust for the Benefit of Preston Marshall;

25. Marshall Petroleum, Inc.;

26. Trof, Inc.;

27. Eleanor Pierce Stevens as successor co-trustee of the Marshall Petroleum, Inc., Stock Holding Trust; and

28. Dr. Stephen Cook, sometimes improperly named as Dr. Steven Cook, as trustee of the Marshall Museum and Library Trust.

3.16. It appears to the Court that plaintiff J. HOWARD MARSHALL III named the following persons as interested parties to this suit:

1. Vickie Lynn Marshall;
2. Dan Manning;
3. Mabel H. Bohannan;
4. Ada Estes;
5. Gladys Estes;
6. James W. Lee;
7. Haverford College;
8. George School;
9. Judy Wilson;
10. Carolyn Lee; and
11. Kay Lee Rains.

3.17. The Court finds further that plaintiff J. HOWARD MARSHALL III joined these persons by service and that these persons appeared, and that J. HOWARD MARSHALL III, pursued no affirmative claim against these persons at trial or by submission of issues to the jury . The Court further finds that these interested parties are entitled to judgment with respect to any claim that could have been brought by J. HOWARD MARSHALL III against any of them in this cause.

3.18. IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by the Court that J. HOWARD MARSHALL III take nothing by this suit against Vickie Lynn

Marshall, Dan Manning, Mabel Bohannan, Ada Estes, Gladys Estes, James W. Lee, Haverford College, George School, Judy Wilson, Carolyn Lee, and Kay Lee Rains and that said alleged interested parties take nothing by this suit.

3.19. The Court finds that its prior interlocutory order with respect to the J. Howard Marshall, II, Living Trust should be, and the same is hereby, made FINAL. After the Court's consideration of the jury's findings with respect to the issues of mental capacity and undue influence that the J. Howard Marshall, II, Living Trust is valid, the Court finds that J. HOWARD MARSHALL II did not lack mental capacity when he executed the J. Howard Marshall, II, Living Trust, and that it was not the product of undue influence.

3.20. IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED by the Court that the Amended and Restated Living Trust Indenture dated the 13th day of July 1994 was not executed ay J. HOWARD MARSHALL II when he lacked the requisite mental capacity and was not the result if undue influence; and

3.21. IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by the Court that the J. Howard Marshall, II, Living Trust Indenture was executed and sufficiently funded by J. HOWARD MARSHALL II in 1982 pursuant to all applicable laws of the State of Texas; that the change of situs of the J. Howard Marshall, II, Living Trust to Louisiana did not make the J. Howard Marshall, II Living Trust invalid; that the provisions and establishment of the J. Howard Marshall, II, Living Trust did not violate any of the laws of the State of Louisiana; and that, in any event, the bases for asserting the invalidity of

certain provisions of the J. Howard Marshall, II, Living Trust herein by J. HOWARD MARSHALL III and VICKIE LYNN MARSHALL, A/K/A ANNA NICOLE SMITH, are not grounds for invalidating the entire J. Howard Marshall, II, Living Trust.

3.22. The Court further submitted a question of fact to the jury regarding counterplaintiffs Marshall Family Defendants, Bettye B. Marshall Trusts, and Dr. Stephen Cook as trustee of the Marshall Museum and Library Trust's counterclaim for declaratory judgment, and the jury found in favor of counterplainttiffs. Further, the Court finds that all decrees pertaining to VICKIE LYNN MARSHALL, A/K/A ANNA NICOLE SMITH and as ordered herein do not arise from any conduct that occurred on or before March 8, 1999.

3.23. IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED by the Court that counter-defendant VICKIE LYNN MARSHALL, A/K/A ANNA NICOLE SMITH, did not have an agreement with J. HOWARD MARSHALL II that he would give her one-half of all his property;

3.24. IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by the Court that VICKIE LYNN MARSHALL, A/K/A ANNA NICOLE SMITH, abandoned any claim as to any property interest, other Interest, or claim of any kind or sort in the estate of J. HOWARD MARSHALL II, in the property or assets of the J. Howard Marshall, II, Living Trust, or in any property that is the subject matter of this proceeding, and that those persons designated in the Last Will and Testament of J. Howard Marshall, II, dated the 22nd day of December 1992 and admitted to Probate by this judgment, and in the Amended

and Restated Living Trust Indenture dated the 13th day of July 1994 shall take that property free of any claim by VICKIE LYNN MARSHALL, A/K/A ANNA NICOLE SMITH;

3.25. IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by the Court that VICKIE LYNN MARSHALL, A/K/A ANNA NICOLE SMITH, has no claim against ROBERT S. MACINTYRE as the court-appointed temporary administrator of the Estate of J. HOWARD MARSHALL II, deceased, or against FINLEY HILLIARD as trustee of the J. Howard Marshall, II, Living Trust, based on any alleged promise by J. HOWARD MARSHALL II to give her any property or based on any other claim that VICKIE LYNN MARSHALL, A/K/A ANNA NICOLE SMITH, made or could have made in this proceeding;

3.26. IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by the Court that any and all claims raised by the pleadings and evidence herein and asserted by the plaintiff VICKIE LYNN MARSHALL, A/K/A ANNA NICOLE SMITH, against defendant E. PIERCE MARSHALL, as an individual acting in his personal capacity; as trustee of the J. Howard Marshall, II, Lifting Trust; as agent or attorney-in-fact for J. Howard Marshall II; as trustee of the Marshall Museum and Library Trust; as co-trustee of the Marshall Grandchildren's Trust for the Benefit of E. Pierce Marshall Jr.; as co-trustee of the Marshall Grandchildren's Trust for the Benefit of Preston Marshall; as trustee of the Marshall Petroleum, Inc., Stock Holding Trust; as trustee of the Bettye B. Marshall Living Trust; as trustee of the J. Howard Marshall, II, Marital Trust Number Two; and as trustee of the E. Pierce Marshall Family Trust created under the Bettye B. Marshall Living Trust Indenture dated October 30, 1990, are hereby

DISMISSED based on her non-suit and abandonment of such claims;

3.27. IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by the Court that any and all claims raised by the pleadings and evidence herein and asserted by the plaintiff VICKIE LYNN MARSHALL, A/K/A ANNA NICOLE SMITH, against the defendants MARSHALL PETROLEUM, INC; TROF, INC.; and MARSHALL OIL & GAS, L.L.C., are hereby DISMISSED based on her non-suit and abandonment of such claims;

3.28. IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by the Court that any and all claims raised by the pleadings and the evidence herein and asserted by VICKIE LYNN MARSHALL, A/K/A ANNA NICOLE SMITH, against the defendant FINLEY HILLIARD as an individual acting in his personal capacity; as trustee of the J. Howard Marshall, II, Living Trust; as trustee of the Grantor Retained Annuity Trust; as trustee of the Charitable Remainder Annuity Trust; as trustee of the J. Howard Marshall Charitable Lead Trust; as trustee of the Marshall Petroleum, Inc., Stock Holding Trust; as trustee of the J. Howard Marshall, II, Liquidating Trust Number Two; and as trustee of the J. Howard Marshall, II, Family Trust are hereby DISMISSED based on her non-suit and abandonment of such claims;

3.29. IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by the Court that any and all claims raised by the pleadings and the evidence herein and asserted by VICKIE LYNN MARSHALL, A/K/A ANNA NICOLE SMITH, against the defendants KEN FARRAR as trustee of the J. Howard Marshall, II, Living Trust; as trustee of the J. Howard Marshall, II, Liquidating Trust

Number One; and as trustee of the J. Howard Marshall, II, Family Trust are hereby DISMISSED based on her non-suit and abandonment of such claims;

3.30. IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by the Court that, pursuant to a written settlement agreement, any and all claims asserted herein by VICKIE LYNN MARSHALL, A/K/A ANNA NICOLE SMITH, against the defendant EDWIN K. HUNTER are hereby DISMISSED WITH PREJUDICE;

3.31. IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by the Court that any and all claims raised by the pleadings and the evidence herein and asserted by VICKIE LYNN MARSHALL, A/K/A ANNA NICOLE SMITH, against the defendant DR. STEPHEN COOK, sometimes improperly named as Dr. Steven Cook, as trustee of the Marshall Museum and Library Trust, are hereby DISMISSED based on her non-suit and abandonment of such claims;

3.32. IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by the Court that any and all claims by any party raised by the pleadings and the evidence herein against the defendant ELAINE MARSHALL as co-trustee of the Marshall Grandchildren's Trust for the Benefit of E. Pierce Marshall Jr. and as co-trustee of the Marshall Grandchildren's Trust for the Benefit of Preston Marshall are hereby DISMISSED based on the abandonment of such claims by the failure to submit any question to the jury based thereon; and

3.33. IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by the Court that any and all claims by any party raised by the pleadings and the evidence herein against the defendant ELEANOR STEVENS as successor

co-trustee of the Marshall Petroleum, Inc., Stock Holding Trust are hereby DISMISSED based on the abandonment of such claims by the failure to submit any question to the jury based thereon.

3.34. The Court finds that any and all claims by VICKIE LYNN MARSHALL against the Estate of J. HOWARD MARSHALL II or against the property in the J. Howard Marshall, II, Living Trust, including but not limited to claims that J. HOWARD MARSHALL II intended but failed to give her or to leave her any portion of such property during his life or upon his death, were required by law to have been asserted as compulsory counterclaims in this proceeding pursuant to TEX. R. CIV. P. 97. The Court further finds that the jury answered the foregoing questions that J. HOWARD MARSHALL II possessed mental capacity as required by law when he executed the Amended and Restated Living Trust indenture dated the 13th day of July 1994 and that the jury has failed to find that said execution was procured through undue influence exercised by E. PIERCE MARSHALL. The Court further finds that the jury answered the foregoing questions that J. HOWARD MARSHALL II possessed testamentary capacity as required by law when he executed the Last Will and Testament of J. Howard Marshall, II, dated the 22nd day of December 1992, and that the jury has failed to find that said execution was procured through undue influence exercised by E. PIERCE MARSHALL. The Court further finds that all defendants are also entitled to a take-nothing judgment based on any claim that VICKIE LYNN MARSHALL, A/K/A ANNA NICOLE SMITH, should have made in this proceeding as a compulsory counterclaim.

3.35. IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED by the Court as a matter of law that VICKIE LYNN MARSHALL, A/K/A ANNA NICOLE SMITH, does not possess any interest in and is not entitled to possession of any property within the Estate of J. HOWARD MARSHALL II or any property of the J. Howard Marshall, II, Living Trust because of any representations, promises, or agreements made by J. HOWARD MARSHALL II to or with VICKIE LYNN MARSHALL, A/K/A ANNA NICOLE SMITH;

3.36. IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by the Court as a matter of law that any and all claims that have been or should have been asserted by VICKIE LYNN MARSHALL A/K/A ANNA NICOLE SMITH, based upon alleged representations, promises, or agreements made by J. HOWARD MARSHALL II to or with VICKIE LYNN MARSHALL, A/K/A ANNA NICOLE SMITH, have been disposed of in this proceeding;

3.37. IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by the Court that J. HOWARD MARSHALL II did not intend to give and did not give to VICKIE LYNN MARSHALL, A/K/A ANNA NICOLE SMITH, a gift or bequest from the Estate of J. HOWARD MARSHALL II or from the J. Howard Marshall, II, Living Trust either prior to or upon his death; and

3.38. IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by the Court that VICKIE LYNN MARSHALL, A/K/A ANNA NICOLE SMITH, shall take nothing from any claim that she should have made in this proceeding as a compulsory counterclaim against any of the following persons and/or legal entities:

1. E. Pierce Marshall;
2. Elaine Marshall;
3. E. Pierce Marshall Jr.
4. Preston Marshall;
5. Finley Hilliard;
6. Robert S. MacIntyre Jr. as the court-appointed temporary administrator of the Estate of J. Howard Marshall II;
7. E. Pierce Marshall as co-trustee of the Marshall Grandchildren's Trust for the Benefit of E. Pierce Marshall Jr.;
8. E. Pierce Marshall as co-trustee of the Marshall Grandchildren's Trust for the Benefit of Preston Marshall;
9. E. Pierce Marshall as Trustee of the Marshall Petroleum, Inc., Stock Holding Trust;
10. E. Pierce Marshall as trustee of the Marshall Museum and Library Trust;
11. E. Pierce Marshall as trustee of the Bettye B. Marshall Estate Trust;
12. E. Pierce Marshall as trustee of the J. Howard Marshall, II, Marital Trust Number Two;
13. E. Pierce Marshall as trustee of the E. Pierce Marshall Family Trust created under the Bettye B. Marshall Living Trust Indenture dated October 30, 1990;
14. Finley Hilliard, individually;
15. Finley Hilliard as trustee of the J. Howard Marshall II Living Trust;
16. Finley Hilliard as trustee of the Marshall Petroleum, Inc., Stock Holding Trust;

17. Finley Hilliard as trustee of the Grantor Retained Annuity Trust;

18. Finley Hilliard as trustee of the Charitable Remainder Annuity Trust;

19. Finley Hilliard as trustee of the J. Howard Marshall Charitable Lead Trust;

20. Finley Hilliard as trustee of the J. Howard Marshall II Liquidating Trust Number Two;

21. Finley Hilliard as trustee of the J. Howard Marshall II Family Trust;

22. Ken Farrar as trustee of the J. Howard Marshall, II, Living Trust;

23. Ken Farrar as trustee of the J. Howard Marshall, II, Liquidating Trust Number One;

24. Ken Farrar as trustee of the J. Howard Marshall, II Family Trust;

25. Elaine Marshall as co-trustee of the Marshall Grandchildren's Trust for the Benefit of E. Pierce Marshall, Jr.;

26. Elaine Marshall, as co-trustee of the Marshall Grandchildren's Trust for the Benefit of Preston Marshall;

27. Marshall Petroleum, Inc.;

28. Trof, Inc.;

29. Eleanor Stevens as successor co-trustee of the Marshall Petroleum, Inc., Stock Holding Trust; and

30. Dr. Stephen Cook, sometimes improperly named as Dr. Steven Cook, as trustee of the Marshall Museum and Library Trust.

3.39. The Court finds that, pursuant to the Uniform Declaratory Judgment Act, TEX. CIV. PRAC. & REM. CODE ANN. §§ 37.009 (Vernon 1987), E. PIERCE MARSHALL is entitled to an award of his reasonable and necessary attorneys' fees as is equitable and just against VICKIE LYNN MARSHALL, A/K/A ANNA NICOLE SMITH. The attorneys' fees awarded herein against VICKIE LYNN MARSHALL A/K/A ANNA NICOLE SMITH are solely and exclusively based upon evidence relating to the attorneys' fees incurred during the trial which occurred in this cause between September 18, 2000 and February 18, 2001.

3.40. IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED by the Court that E. PIERCE MARSHALL have and recover from VICKIE LYNN MARSHALL, A/K/A ANNA NICOLE SMITH, attorneys' fees in the sum of FIVE HUNDRED FORTY-ONE AND NO/100 DOLLARS ($541,000.00) for services rendered through the trial of this cause. In the event of an appeal by VICKIE LYNN MARSHALL, A/K/A ANNA NICOLE SMITH, to the court of appeals, if such appeal is unsuccessful, E. PIERCE MARSHALL will be further entitled to recover ONE HUNDRED THOUSAND AND NO/100 DOLLARS ($100,000.00) from VICKIE LYNN MARSHALL, A/K/A ANNA NICOLE SMITH, as additional reasonable attorneys' fees. In the event of an appeal by VICKIE LYNN MARSHALL, A/K/A ANNA NICOLE SMITH, to the Supreme Court of Texas, if such appeal is unsuccessful, E. PIERCE MARSHALL will be further entitled to recover ONE HUNDRED THOUSAND AND NO/100 DOLLARS ($100,000.00) from VICKIE LYNN MARSHALL, A/K/A ANNA NICOLE SMITH, as additional reasonable attorneys' fees;

3.41. IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by the Court that the counterclaimant E. PIERCE MARSHALL as trustee of the Bettye B. Marshall Trusts have and recover actual damages and prejudgment interest from the counterdefendant J. HOWARD MARSHALL III in the sum of FOUR MILLION AND NO/100 DOLLARS ($4,000,000.00), plus prejudgment interest at the rate of 10% from December 14, 1998, until date of judgment and exemplary damages in the amount of SIX MILLION AND NO/100 DOLLARS (6,000,000.);

3.42. IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by the Court that E. PIERCE MARSHALL have and recover from the ESTATE OF J. HOWARD MARSHALL II attorneys' fees in the sum of EIGHT HUNDRED THIRTY-THREE THOUSAND AND NO/100 DOLLARS ($833,000.00) for services rendered through the trial of this cause. In the event of an appeal by J. HOWARD MARSHALL III to the court of appeals, if such appeal is unsuccessful, E. PIERCE MARSHALL will be further entitled to recover FOUR HUNDRED THOUSAND AND NO/100 DOLLARS ($400,000.00) from the ESTATE OF J. HOWARD MARSHALL II as additional reasonable attorneys' fee. In the event of an appeal by J. HOWARD MARSHALL III to the Supreme Court of Texas, if such appeal is unsuccessful. E. PIERCE MARSHALL will be further entitled to recover EIGHTY-NINE THOUSAND AND NO/100 DOLLARS ($89,000.00) from the ESTATE OF J. HOWARD MARSHALL II as additional reasonable attorneys' fees;

4. MOTION FOR JUDGMENT NOTWITHSTANDING, THE VERDICT

4.1. The Court, having heard the Motion for Judgment Notwithstanding the Verdict filed by J. HOWARD MARSHALL III and having considered the evidence and argument of counsel, is of the opinion that such Motion should be GRANTED in part and DENIED in part,

4.2. IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that:

4.2.1. the Motion for Judgment Notwithstanding the Verdict is GRANTED that E. PIERCE MARSHALL, ELAINE MARSHALL, E. PIERCE MARSHALL JR., PRESTON MARSHALL, and the Marshall Museum and Library Trust take nothing by reason of the jury's answers to Jury Questions No. 62, 63, 64, and 65, for the reason that, as a matter of Texas law, the filing of a will contest and/or the filing of a claim for an interest in an estate and/or the filing of a claim against an heir of an estate does not constitute tortious interference with inheritance rights.

4.2.2. the Motion for Judgment Notwithstanding the Verdict is DENIED as to the jury's answers to Questions No. 62, 63, 64, and 65 on the basis of no evidence or insufficient evidence, because the Court specifically finds that the Jury's answers to Questions No. 62, 63, 64, and 65 are fully supported by sufficient evidence;

4.2.3. the Motion for Judgment Notwithstanding the Verdict is DENIED that the MARSHALL MUSEUM AND LIBRARY TRUST and the BETTYE B. MARSHALL TRUSTS are not entitled to damages in accordance with the jury's answers to Jury Questions Nos. 67, 68, and 69,

and judgment will be granted in accordance with the jury's verdict. The Court specifically finds that the jury's answers to Questions No. 67, 68, and 69 are fully supported by sufficient evidence;

4.2.4. the Motion for Judgment Notwithstanding the Verdict is DENIED that the MARSHALL MUSEUM AND LIBRARY TRUST and the BETTYE B. MARSHALL TRUSTS are not entitled to punitive damages pursuant to the jury's answers to Jury Questions Nos. 71 and 72, and judgment will be granted in accordance with the jury's verdict;

4.2.5. the Motion for Judgment Notwithstanding the Verdict is GRANTED that E. PIERCE MARSHALL, FENLEY HILLIARD, and KEN FARRAR take nothing by virtue of their claims for attorneys' fees against HOWARD MARSHALL III, for the reason that there is no statutory basis for the recovery of Attorneys' fees as a matter of Texas Law; because J. HOWARD MARSHALL III, is not a party against whom attorneys' fees may be awarded in a will contest. The Court specifically finds that the jury's answers to Questions No. 58 and 60 are fully supported by sufficient evidence;

5. SANCTIONS MOTIONS

5.1. **BE IT FURTHER REMEMBERED** that on the 29th day of May 2001 and the 6th, 15th, and 18th days of June 2001 came on for hearing in due order and time the Defendants' motions for sanctions against Plaintiffs VICKIE LYNN MARSHALL and J. HOWARD MARSHALL III, respectively. Based on the contents of the file in the cause, the conduct of all counsel before and during the trial of the cause, all summary judgment filings and

evidence, the argument of counsel, the evidence adduced during the trial and the aforesaid hearings, and having been fully apprised of the premises, the Court here and now DENIES said motions.

5.2. The Court does not find that VICKIE LYNN MARSHALL and J. HOWARD MARSHALL III, acting in conjunction with and through their attorneys, violated TEX. R. CIV. P. 13, and TEX. CIV. PRAC. & REM. CODE ANN. §§ 10.001(1) and 10.001(3) (Vernon Supp. 2001) by the filing of pleadings in this cause. The Court further specifically finds that the pleadings of VICKIE LYNN MARSHALL and J. HOWARD MARSHALL III do not contain allegations or other factual contentions that are without evidentiary support.

5.3. The Court further does not find that any pleading or motion was presented by VICKIE LYNN MARSHALL and/or J. HOWARD MARSHALL III for any improper purpose, including to harass or to cause unnecessary delay or needless increase in the cost of litigation.

5.4. IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED by the Court that Defendants' motions for sanctions against VICKIE LYNN MARSHALL, A/K/A ANNA NICOLE SMITH, and J. HOWARD MARSHALL, III, pursuant to TEX. R. CIV. P. 13 and TEX. CIV. PRAC. & REM. CODE ANN. § 10.004 (Vernon Supp. 2001), are DENIED;

6. RECONSIDERATION OF DISCOVERY SANCTIONS

6.1. BE IT FURTHER REMEMBERED that on the 6th day of June 2001 came on for hearing in due order and

time the Defendants' Motion to Set Aside Sanctions Against Them and Their Counsel and to impose Sanctions on Howard Jr. and His Counsel for Discovery Abuse; and, having heard the argument of counsel, having received the evidence, and having been fully apprised of the premises, the Court here and now GRANTS said motion in the following particulars.

6.2. The Court finds that Defendants objected to each and every one of the Master's Reports, but the *de novo* hearings to which the Defendants were entitled under Texas law were not held. The Court therefore declines to make final the interlocutory orders for sanctions and sets aside all such interlocutory orders.

6.3. IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED by the Court that all previous sanctions orders of the Court, including the Court's Orders of March 10, 1997; May 20, 1997; October 1997; October 21, 1997; December 4, 1997; June 9, 1998; August 28, 1998; September 28, 1998; October 5, 1998; October 12, 1998; and November 3, 1998, are not affirmed in this Final Judgment. Without limiting in any way the generality of the foregoing, the Court specifically holds that the Orders requiring Elizabeth Tipton and Rusty Hardin to pay sanctions upon the entry of final judgment in this case are not made final, and may not be enforced.

6.4. IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED by the Court that the sum of NINETY-FOUR THOUSAND NINE HUNDRED NINETEEN AND NO/100 DOLLARS ($94,919.00), paid by E. PIERCE MARSHALL in master's fees and expenses, are charged as court costs against plaintiff J. HOWARD MARSHALL III;

6.5. IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by the Court that the Orders requiring Elizabeth Tipton and Rusty Hardin to pay sanctions to JACK LAWTER and DIANE LAWTER upon the entry of final judgment in this case are SET ASIDE AND HELD FOR NAUGHT; and

6.6. IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by the Court that J. HOWARD MARSHALL III pay ONE HUNDRED ONE THOUSAND THREE HUNDRED AND NO/100 DOLLARS ($101,300.00), the amount of attorneys' fees previously paid as sanctions to his attorneys Jack and Diane Lawter, to E. PIERCE MARSHALL as reimbursement of the sanctions previously paid by said defendant.

7.1. IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by the Court that the total amount of the judgment rendered will bear post-judgment interest at the rate of ten percent (10%) compounded annually from the date of judgement until paid; and

7.2. IT IS FURTHER ORDERED by the Court that all other costs of Court in this cause are adjudged jointly and severally against J. HOWARD MARSHALL III, plaintiff and counterdefendant, and VICKIE LYNN MARSHALL, A/K/A ANNA NICOLE SMITH, counterdefendant, for which let execution issue without further order of the Court if the same be not timely paid.

7.3. All writs and processes for the enforcement of and collection of this judgment or the costs of court will issue as necessary.

7.4. This Final Judgment finally disposes of all parties and all claims and is appealable.

SIGNED this 7th day of December, 2001.

/s/ Mike Wood
HONORABLE MIKE WOOD
JUDGE PRESIDING

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

In re **VICKIE LYNN MARSHALL,** **E. PIERCE MARSHALL,** **Plaintiff,** **v.** **VICKIE LYNN MARSHALL,** **Defendant.** **VICKIE LYNN MARSHALL,** **Counterclaimant,** **v.** **E. PIERCE MARSHALL,** **Counterdefendant.**	**CASE NO. SA CV 01-97 DOC** **(BANKRUPTCY CASE NO. LA 96-12510 SB; ADVERSARY CASE NO. AD 96-1838 SB)** **JUDGMENT** (Filed Mar. 7, 2002)

This action came before the Court for a de novo review of the proposed findings of fact and conclusions of law issued by the bankruptcy court after trial in this matter. Beginning on June 25, 2001, this Court conducted a de novo review of the bankruptcy court's proposed findings. From December 11, 2001 to January 8, 2002, this Court conducted an evidentiary hearing wherein it accepted the testimony of the central figures in the case, documentary evidence, and arguments of counsel. After reviewing all of the evidence in this matter and findings of fact and conclusions of law having been rendered,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of Vickie Lynn Marshall and against E. Pierce Marshall, as follows:

1. Vickie Lynn Marshall shall recover from E. Pierce Marshall compensatory damages in the amount of $44,292,767.33.

2. Vickie Lynn Marshall shall recover from E. Pierce Marshall punitive damages in the amount of $44,292,767.33.

3. Vickie Lynn Marshall shall recover costs of suit, to be taxed by the Clerk, in the amount of $___.

4. E. Pierce Marshall shall recover nothing against Vickie Lynn Marshall.

IT IS SO ORDERED.

DATED: MARCH 7, 2002

/s/ David O. Carter
DAVID O. CARTER
United States District
Judge

Nos. 02-56002, 02-56067

United States Court of Appeals
for the
Ninth Circuit

E. PIERCE MARSHALL,

Plaintiff, Counter-Defendant, Appellant,

-against-

VICKI LYNN MARSHALL,

Defendant, Counter-Claimant, Appellee.

APPEAL FROM THE FINAL DECISION OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA IN NO. CV-01-00097 (HONORABLE DAVID O. CARTER, JUDGE)

SUBSTITUTED CORRECTED OPENING BRIEF OF APPELLANT E. PIERCE MARSHALL

(Filed August 11, 2003)

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* * *

A. General Background

J. Howard married his first wife, Eleanor Pierce Marshall, in 1931. ER 3356. They had two sons, Pierce and J. Howard Marshall III ("Howard Jr."). ER 5216. J. Howard and Eleanor divorced in 1961. ER 3356.

That same year, J. Howard married his second wife, Bettye Bohannon Marshall. ER 3061. In 1986, Bettye was diagnosed with Alzheimer's disease. ER 5315. Bettye died in 1991. ER 3085.

In 1982, J. Howard met Jewell Dianne Walker ("Lady Walker") at a bar where she worked as a dancer. ER 3043. During the course of their relationship, J. Howard gave Lady Walker gifts of jewelry and other property worth millions of dollars. ER 3084, 3088-89. J. Howard established and funded a corporation for her benefit, known as Coliseum Oil and Gas, and transferred ownership of the corporation to her. ER 3514. At no time did J. Howard ever name Lady Walker as a beneficiary under his estate planning instruments. ER 131, 146, 225, 264, 289, 352, 3087. In addition, in spite of his affection for Lady Walker, J. Howard never gave her any interest in his principal assets. ER 3087. Instead, he provided for Lady Walker through the *inter vivos* gifts that he gave her during the course of their relationship. ER 3088-89. Lady Walker died in July of 1991. ER 5230.

Vickie and J. Howard met in Houston sometime in late 1991 at a club where she danced. ER 2419, 2420, 5410. The two were married in June of 1994. ER 95. At the

time of their marriage, she was twenty-six and he was eighty-nine. ER 95, 2420.

Both prior to and during their marriage, J. Howard gave Vickie substantial gifts worth over $6 million. ER 24-25, 2536-39, 2547-48. He bought several homes and automobiles for her use. ER 5534, 2548. He bought millions of dollars worth of jewelry for her use. ER 25. He promoted her career as a Playboy Playmate and international model. ER 4914, 4945. J. Howard paid for these gifts largely with borrowed funds. ER 5024, 5100.

Apart from these *inter vivos* gifts, J. Howard made no provision for Vickie in any of his estate planning instruments. ER 95, 1018. Nor did J. Howard ever give Vickie any interest in his business assets, including his stock holdings. ER 528, 644, 789, 819, 1017, 2378.

Both before and during the marriage, Vickie lived primarily in Los Angeles while J. Howard lived in Houston. ER 5137, 2490. Fourteen months after the marriage, on August 4, 1995, J. Howard died. ER 95.

B. J. Howard's Business Interests

In 1954, during his marriage to Eleanor, J. Howard helped establish the Great Northern Oil Company ("Great Northern"). ER 5210. J. Howard held a minority stake in this company. ER 5211.

Because J. Howard acquired his interest in Great Northern during his marriage to Eleanor, his interest was community property of that marriage. At the time J. Howard and Eleanor divorced in 1961, they divided their community property and placed their Great Northern stock into separate property trusts. ER 2622-23, 2672,

5217.[2] Although following the divorce Eleanor had her own Great Northern stock, she left control over her interests in J. Howard's hands. ER 5216-17.

Through a series of transactions between 1969 and 1972, the Koch family acquired a majority interest in Great Northern and consolidated the company into Koch Industries ("Koch"). ER 5212-13. As a result, J. Howard and his family became minority shareholders of Koch, holding approximately 8% of its stock. ER 5214.

In 1974, Koch declared a dividend of voting stock to existing shareholders. ER 5215-16. The shareholders' old stock became non-voting stock. ER 5215-16. Later in 1974, J. Howard and Eleanor gave all of their Koch voting stock in equal shares to their two sons, Pierce and Howard Jr. ER 5216, 5009. J. Howard and Eleanor retained their Koch non-voting stock in their separate trusts. ER 1457-58, 5212-5216.

During his marriage to Bettye, J. Howard and Bettye were meticulous about keeping their respective separate assets separate. ER 5220.[3] Although J. Howard and Bettye jointly invested their community property (i.e., the income from their separate property), at no time did J. Howard

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[2] During their marriage, and at the time of their divorce, J. Howard and Eleanor lived in California. California is a community property state. Cal. Fam. Code § 760 (West 1994). J. Howard moved to Texas in 1961. ER 3144.

[3] Under Texas law, the property that an individual owns prior to marriage, together with any appreciation in the value of that property, is the separate property of the individual and not community property. Tex. Fam. Code Ann. § 3.001 (Vernon 1998). In contrast, income from separate property that accrues during the marriage is considered community property. *Id.*, § 3.002; *see Colden v. Alexander*, 171 S.W.2d 328, 334 (Tex. 1943).

ever give Bettye any interest in his separate property, including his separate interest in his Koch stock. ER 5220.

Prior to 1980, the Koch family's majority stake in Koch was divided principally among four members of the Koch family. ER 3041. In that year, a dispute erupted within the Koch family over the management and direction of the company. ER 3072, 3073-74, 3129-30. Pierce and his father sided with those who wished to maintain the company's direction. ER 5344. Howard Jr. sided with those who wished to change the company's management philosophy. ER 3358-59, 5344.

To prevent Howard Jr. from voting his shares to oust the existing Koch board of directors, J. Howard purchased all of Howard Jr.'s stock from him for $8 million – a price that J. Howard viewed as exorbitant. ER 5218, 5345. In order pay for this purchase, J. Howard arranged to sell Howard Jr.'s shares back to Koch. ER 5219. As a result of this transaction, J. Howard and the members of the Koch family who wished to maintain the company's direction were able to do so. ER 3103-04.[4]

Following J. Howard's purchase of Howard Jr.'s Koch stock, J. Howard changed his estate plan to provide that Pierce and Bettye would be the principal beneficiaries of his estate. ER 131-146. J. Howard believed that Howard Jr. had betrayed him and that, in purchasing Howard Jr.'s stock for $8 million, J. Howard had been forced to overpay

[4] Subsequently, Koch bought back the shares of the dissident members of the Koch family. ER 5224. Since that time, Koch has remained a privately-held business. ER 3386-87. This buy-out had the effect of increasing the Marshall family's interest in Koch to 16%. ER 5213-14, 5224.

for the stock. ER 5218, 5345. Consequently, J. Howard excluded Howard Jr. from any distributions under his estate plan. ER 131, 146, 225, 264, 289, 352, 392, 510, 528, 5223.

In 1984, J. Howard, Eleanor, and Bettye formed a company called Marshall Petroleum, Inc. ("MPI"). ER 1455-56, 2623, 5222. J. Howard and Eleanor each contributed their Koch shares from their separate trusts to MPI in exchange for MPI stock. ER 164, 5222. At the time Bettye married J. Howard, she had her own Koch stock, which she retained in her own separate property trust. ER 5221. At MPI's formation, J. Howard's trust controlled approximately 55% of the company, Eleanor's trust controlled 42%, and Bettye's trust controlled 3%. ER 5222.

In 1989, Eleanor's trust sold some of her MPI stock back to MPI for cash. ER 3142. In 1991, upon Bettye's death, Bettye's interest in MPI passed to J. Howard. ER 5707-28. By 1992, J. Howard's trust controlled approximately 70% of MPI. ER 3494.

MPI's business activities included collecting and investing the dividends paid on the Koch stock that it owned, and managing the ownership and operation of various oil and gas properties. ER 3702-03. The MPI stock in J. Howard's trust was the principal source of his wealth. ER 3076-77. J. Howard served as an officer and director of MPI until shortly before his death. ER 4983.

C. J. Howard's Estate Planning

Beginning in 1982 – nine years before he met Vickie – J. Howard began keeping all of his assets, including his MPI stock, in a revocable form of trust known as a living

trust. ER 1018, 2623. From 1982 until his death, J. Howard executed a series of amended and restated instruments governing the terms of his living trust (the "Living Trust"). ER 131, 1453-55.

J. Howard's principal goal in setting up his Living Trust was to provide a mechanism for the distribution of his property upon his death. ER 5004-05. Each living trust instrument named the beneficiaries who would receive his property after he passed away. ER 131, 146, 225, 261-62, 264, 289, 352, 392 510, 528, 644. During his lifetime, J. Howard retained the beneficial interest in his Living Trust and thus received the income derived from the trust's assets (including income from the trust's shares of MPI stock). ER 146, 225, 528, 644, 789, 5268.

During his marriage to Bettye, J. Howard named Bettye and Pierce as the principal beneficiaries under his Living Trust. ER 146, 225, 289, 352, 5004-05. After Bettye's death, J. Howard designated Pierce as the principal beneficiary. ER 392, 528, 644.

During his lifetime, J. Howard stated repeatedly that he wanted Pierce to have his shares of MPI and, derivatively, the benefit of his interest in Koch. ER 3209, 5108-09.[5] Beginning long before his marriage to Vickie, J. Howard periodically gave Pierce gifts of MPI stock. ER 340, 605. Pierce also purchased shares of MPI and acquired them as compensation for services as an MPI

[5] As one of J. Howard's estate planning attorneys testified, "it is clear that he wanted his MPI shares to go to Pierce. Nothing M. Marshall ever did in his lifetime could be more clear than that." ER 3209. Correspondingly, as another one of J. Howard's estate planning lawyers testified, "there was never any intention to get [Vickie] any interest in Marshall Petroleum or Koch Industries." ER 4926.

officer. ER 5225. In addition to serving as a director of MPI, Pierce is a member of the board of directors of Koch and participates in running Koch. ER 1887.

On July 13, 1994, two weeks after J. Howard married Vickie, he executed his final amended and restated living trust instrument fixing the terms of his Living Trust. ER 3264-3268. In accordance with J. Howard's instructions, this instrument rendered the Living Trust irrevocable. ER 645-46, 1018, 3210. Although J. Howard made the Living Trust irrevocable, he nevertheless retained the power to make certain changes. ER 644.

First, he retained the power to add any charity as a beneficiary. ER 644, 3211. Second, he retained the power to substitute any beneficiary named in the trust for any other beneficiary. ER 644, 3194. As a result, until his death, J. Howard retained the right to exclude Pierce as a beneficiary, or to reduce Pierce's share, by increasing the share of any other beneficiary. ER 644, 5250. In addition, the Living Trust remained responsible for J. Howard's debts until his death. ER 644. As a result, J. Howard retained the ability to borrow against the assets in the Living Trust. ER 644.

In addition to the Living Trust, J. Howard left a series of wills. ER 131, 264, 510, 819, 4712. J. Howard's last will (the "Will"), like all of his previous wills after 1982, was a "pourover" will. This means that the Will left all of J. Howard's property not already in the Living Trust to the trust to be distributed after his death in accordance with the terms of the trust. ER 514-16. J. Howard executed his final Will on December 22, 1992. ER 510.

The Living Trust, rather than the Will, was the primary instrument that specified how J. Howard's property would be distributed upon his death. As a result, the Living Trust, rather than the Will, constituted J. Howard's principal estate planning instrument.

At no time did J. Howard ever make Vickie a beneficiary under his Will or Living Trust (other than with respect to certain real estate that he ultimately transferred to her out of the Living Trust shortly after their marriage); nor did he direct that she be added as a beneficiary. ER 95, 510, 647-51, 819, 1018, 2498, 2633. In addition, there are no drafts of either of these documents that name Vickie as a beneficiary.

Since Bettye's death, J. Howard specifically intended and provided that most of his property would be given to Pierce. ER 48, 528, 644, 649, 2967-68. Among other reasons, J. Howard trusted that, in handling the business affairs of MPI, participating in the management of Koch, and voting the Koch stock, Pierce would adhere to J. Howard's business philosophy for the continued growth and prosperity of Koch. ER 2267, 5004-06. J. Howard also wanted to keep MPI and the Koch stock intact as the "crown jewels" of the Marshall family, and trusted that Pierce would never sell these assets. ER 2267, 5004-06. In addition, J. Howard stated repeatedly that he intended to provide for Vickie with the gifts that he gave her during his lifetime. ER 2417-018, 2498, 2509, 2960-61, 3404-05.

J. Howard's second goal in setting up his estate plan was to minimize the taxes that would have to be paid upon his death. ER 2382. Throughout his adult life, J. Howard consistently pursued strategies to minimize the tax consequences of his transactions and any estate tax that

would have to be paid after he passed away. ER 2382. After J. Howard's death, the Internal Revenue Service ("IRS") scrutinized his income tax returns, his estate plan, and the various transactions underlying it. *See* 5469. Although J. Howard's estate is required to pay substantial taxes, the IRS did not find any of his estate planning transactions to be illegitimate, and the matter has been finally settled. ER 5469.

Because all of J. Howard's assets were held in the Living Trust, any purported gift to Vickie from J. Howard's assets (apart from the property that J. Howard actually gave her during his lifetime) would have had to come out of his Living Trust.

D. Events Prior to the Marriage

Soon after J. Howard met Vickie in 1991, he began giving her gifts. After Vickie's own car was repossessed, J. Howard purchased a new Toyota Celica for her use. ER 5157. He began giving her cash to pay her bills. ER 1303, 2405, 2934, 3586. He also began buying expensive jewelry for her use. ER 2934, 3585-3586. Over time, J. Howard purchased jewelry for Vickie's use costing in excess of $4 million. ER 3585-86, 3588.

On September 16, 1992, J. Howard purchased a ranch in Tomball, Texas for Vickie's use (the "Tomball Ranch"). ER 3409-10, 5170. Initially, he kept title to the ranch in the Living Trust. ER 5035, 5532. J. Howard also purchased a home for Vickie's use in Houston (the "Rustington House"). ER 3409-10, 3575. Title to the Rustington House was held in a land trust with Vickie and her minor son Daniel named as beneficiaries. ER 424.

Because Vickie spent a great deal of time in Los Angeles, J. Howard leased a home for her there. ER 3583-84. Later, he purchased a different home for her use there (the "Brentwood House"). ER 3587, 5171. In 1992 he purchased a new Mercedes for her use. ER 5160. J. Howard initially kept the title to the car in his own name. ER 3139.

In addition to these gifts, J. Howard promoted Vickie's career as a Playboy Playmate and international model. ER 5134-35. He bought her expensive clothing and gave her cash. ER 2933-34, 3576-77.

J. Howard paid for most of these gifts with borrowed funds. ER 3302, 5024. Although J. Howard received a salary from MPI and distributions from his Living Trust (which owned his MPI stock and received dividends from these shares), his gift-giving to Vickie far exceeded his income and J. Howard borrowed the money to pay for most of these gifts from MPI. ER 1309-10, 2401.

MPI had a revolving $15 million line of credit with Texas Commerce Bank. ER 2255, 5228.[6] MPI would borrow money periodically on this line of credit and would then lend the funds to J. Howard, who would use the money to buy gifts for Vickie. ER 3706-07, 5293. As a result, J. Howard became heavily indebted to MPI. ER 2256, 4963, 5293.

As J. Howard's gifts to Vickie increased, he consulted with one of his lawyers, Harvey Sorensen, about ways to

[6] This line of credit was secured by a pledge of the Koch stock that MPI owned. ER 5229. MPI's primary source of income was the dividends that it received on its Koch stock. ER 3076-77.

reduce his liability for gift taxes. ER 562-63, 4903-13. Previously, J. Howard had been required to file gift tax returns and pay substantial gift taxes for the gifts that he had given to Lady Walker. ER 5007-5019. These filings had sparked an audit by the IRS. *Id.* In his discussions with Sorensen, J. Howard explored a number of ideas regarding how to make gifts to Vickie while minimizing his taxes. ER 504-509, 562-63, 4905-15, 4925-26.

Sorensen was not J. Howard's only counsel. In addition, J. Howard consulted with his attorney Edwin Hunter over tax, gift, and estate planning matters. ER 4975-78, 5226. J. Howard first retained Hunter in 1988. ER 5226.

After meeting Vickie, J. Howard proposed that they be married. ER 5158-59. In anticipation of marriage, J. Howard asked Sorensen in late 1992 to draft a prenuptial agreement. ER 4892-4896. Sorensen prepared a draft, and presented it to J. Howard on November 18, 1992. ER 445-498, 4896, 5019. Under the terms of this draft, Vickie would have been entitled to receive $100,000.00 for each month of marriage, less the value of the gifts that J. Howard gave her during the marriage. ER 478, 480, 4902, 4897, 4902.[7] The agreement also provided that Vickie's entitlement would be reduced by half if she were unfaithful. ER 481.[8] J. Howard was apparently dissatisfied with the length of the draft, and asked Sorensen to revise it. ER 4896, 5020.

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[7] The agreement provided further that Vickie would be entitled to the benefit of $5 million placed in trust if she had a child with J. Howard, which did not occur. ER 478, 4897.

[8] Vickie was unfaithful. ER 2340-43.

J. Howard also gave a copy of the draft prenuptial agreement to Hunter and asked him to revise it. ER 5019-20. On December 14, 1992, J. Howard spoke with another one of his attorneys, Jeff Tonwnsend. ER 499. Thereafter, Townsend sent a letter to Hunter listing several ideas relating to Vickie: the prenuptial agreement; the creation of a "Marshall Farms" corporation; the creation of a corporation for Vickie's business; and a "catch-all" trust. ER 499.

Hunter revised the prenuptial agreement. ER 5020, 5025-33, 5636-43. Like the prior draft prepared by Sorensen, this revised agreement provided Vickie with a limited entitlement. ER 5021-25, 5638-40. Hunter worked independently of Sorensen on the revised prenuptial agreement. ER 5020, 5044-45.

Subsequently, J. Howard had the prenuptial agreement sent to Vickie's counsel for review. ER 2633. Vickie declined to sign the agreement. ER 2633.

Hunter also prepared documents for a "Marshall Farms" corporation. ER 5036-37. As indicated previously, J. Howard had purchased the Tomball Ranch for Vickie's use. ER 5035. The Living Trust, however, actually held title so that Vickie's creditors could not reach it. ER 5097-98. J. Howard inquired whether the expenses of running the ranch could be deducted for tax purposes. ER 4907-11, 5034-35. One possible way to accomplish this might be if the ranch were used to raise livestock. ER 5034-35.

In addition, Hunter prepared documents for a corporation for Vickie's modeling business, which ultimately became "Compagnie Victoire." ER 564, 5048. The purpose of this company was, in part, to permit J. Howard to make investments in Vickie's career. ER 2278, 3516, 5132-33.

Another purpose was to hold Vickie's business assets and other items that J. Howard gave her. ER 4914.

The last item listed on Townsend's letter, the "catch-all trust," was never pursued by J. Howard or any of his counsel. ER 5791-97, 5810-16, 5838-43.

On December 22, 1992, J. Howard met with Sorensen to execute his final Will and an amended and restated living trust instrument. ER 510, 528, 4942-43. Previously, on December 21, 1992, J. Howard met alone with Sorensen to discuss several items and ideas relating to Vickie. ER 2379-80, 4904-4909. Sorensen's agenda for the meeting included the Marshall Farms idea; a corporation to promote Vickie's modeling career (Compagnie Victoire); establishing a grantor retained income trust ("GRIT"); J. Howard's possible adoption of Vickie to reduce his tax liability; and the prenuptial agreement. ER 2378, 4905-09, 4913-17, 4922-23, 4887-90.

Sorensen advised J. Howard against adopting Vickie, and J. Howard dropped the idea. ER 2378, 4887-90. Sorensen also advised against the creation of the Marshall Farms corporation and the modeling corporation (Compagnie Victoire), and thought that J. Howard had accepted his advice. ER 1471-72, 4932-33. Ultimately, however, Hunter arranged to put these two corporations into place. ER 564, 571.

Although Sorensen listed the idea of the GRIT on his agenda as a possible tax planning device, J Howard rejected the concept. ER 5798-5803. Instead, J. Howard had a different idea about a transaction for Vickie – provided that it would not trigger any tax liability. ER 1467-8, 3172-73, 4878, 4924-26.

After his meeting with J. Howard, Sorensen dictated a memorandum regarding the meeting (the "New Community Memo"). ER 562, 1465-66. The New Community Memo indicates that J. Howard wanted Sorensen to explore the feasibility of a type of option for Vickie. ER 562, 3172-73. The value of the option would be based on a formula that took into account increases in the amount of dividends paid on the Koch stock and certain interest rates. ER 562, 4876-78, 5536-37. Under J. Howard's idea, Vickie would not be entitled to receive any payment on the option until fifteen years after the death of J. Howard's first wife, Eleanor. ER 562, 3171, 4926.

Sorensen and members of his firm researched J. Howard's option idea. ER 3172, 4876-79, 4927-28, 5536-37. Sorensen concluded that it was not feasible for tax reasons. ER 2383, 3171-72, 4927-28. In January of 1993, Sorensen advised J. Howard of the results of his research, and J. Howard instructed Sorensen to drop the matter. ER 3172, 4927-30. Significantly, if J. Howard had implemented this idea for Vickie, she would be entitled to little or nothing based on the formula set out in the memo. ER 5113-17, 5536-37.

Through the end of 1992, Hunter continued work on the creation of Compagnie Victoire, which was incorporated on December 30, 1992. ER 564, 578. Hunter's work included analysis of how the corporation would be structured and controlled. ER 580, 5038-43. J. Howard was concerned that Vickie did not know how to handle her assets or money. ER 5097-98. One idea was to place the shares of the corporation in trust for Vickie's benefit. Another idea was to create a voting trust governing how the corporation would be run. ER 4948-49.

After Compagnie Victoire was established, J. Howard anticipated that he would use it as the vehicle to make investments in Vickie's modeling career. ER 1463, 3090, 3704-05, 4914, 4945. J. Howard anticipated that it would be several years before Vickie's career reached its peak, and that the income from her career, backed by his investments made during his lifetime, would provide her with ample funds for her support. ER 5266, 5569, 2604.

E. 1993 Estate Planning Changes

In early 1993, Sorensen was working on a number of matters for the Marshall family, including the gift tax audit relating to J. Howard's gifts to Lady Walker. ER 3184-86, 4953-54. J. Howard had previously asked Pierce to be involved with this work. ER 1460, 3146-47, 4941. In February, J. Howard asked Pierce to instruct Sorensen to stop work temporarily on the gift tax audit pending further discussions. ER 3045-46. Pierce sent a letter to Sorensen accordingly. ER 579, 3045-46. Thereafter, Sorensen continued working for the Marshall family. ER 4934-35.

At this time, J. Howard turned to Hunter to make revisions to his estate plan. ER 540-602, 4975-78. J. Howard had three principal goals. ER 3058, 4984-85. First, he wanted to maximize his cash position to be able to continue making gifts to Vickie. ER 3058, 4985. Second, he wanted to minimize the tax liabilities to his estate. ER 3058, 4976, 4983. Third, he wanted to ensure that Pierce would be the primary beneficiary of his assets after he passed away. ER 4983-84. J. Howard asked Hunter to come up with ways to further these goals. ER 590-602, 4986-88.

During this time, J. Howard's accountant, Finley Hilliard, was pressing J. Howard to document and resolve his various loans from MPI. By this time, J. Howard had borrowed millions from MPI to fund his gift giving to Vickie. ER 3503-06, 3553-61, 5024, 5100, 5121-23, 5538, 5557, 5569-70. These loans appeared on MPI's books as "due from officer" accounts. ER 4958. J. Howard's failure to properly document and account for these loans had the potential of putting at risk MPI's status as an "S" corporation. ER 4958. J. Howard's failure to account for these loa was also unfair to other shareholders of MPI, principally Eleanor's trust, who were shouldering the burden of J. Howard's debt. ER 3091-92.

On August 25, 1993, J. Howard executed a series of transactions to clean up his loan balances with MPI and further his estate planning goals. First, in order to satisfy his debts to MPI, J. Howard sold 14,065 shares of his MPI stock back to MPI. ER 590, 603, 623, 634, 5059-60.[9]

Second, in order to maximize his cash position and further his goal of transferring his assets to Pierce, J. Howard sold 35,466 shares of MPI stock to Pierce for $17.5 million. ER 590, 616, 3318-19, 4995, 5059-62. As part of this transaction, Pierce executed a note to J. Howard that required Pierce to make periodic payments (the "Pierce Note"). ER 622, 3340, 5055-58, 5254-55.[10] Pierce has consistently made the payments called for under the note. ER 3134-35, 3223-25.

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[9] The stock that J. Howard sold to MPI in this transaction came out of the Living Trust.

[10] The stock that J. Howard sold to Pierce in this transaction also came out of the Living Trust. Pierce's payments under his note were made to the Living Trust.

Third, consistent with his prior practice of periodically giving shares of MPI stock to Pierce, J. Howard gave Pierce 2,044 shares of MPI stock. ER 605, 5054, 3317.[11] Under the terms of this gift, Pierce was responsible for paying any related gift tax. ER 605, 4998-99, 5054. In addition, J. Howard gave Pierce a second gift of 2,146 shares. ER 608.

Fourth, J. Howard transferred 47,288 shares of his MPI stock to a special trust known as a Grantor Retained Annuity Trust ("GRAT"). ER 611-614, 2625, 2635.[12] In this transaction, J. Howard exchanged shares of MPI for annuity payments from the GRAT. ER 611-614, 708, 846-48, 2624-26. This had the effect of establishing an income stream for J. Howard to fund his lifestyle. ER 3349. The transaction also had a potential tax benefit from an estate planning perspective. ER 2635, 5053.

Under the terms of the GRAT, the GRAT would hold the 47,288 shares of MPI stock for a term of five years while the GRAT paid for the shares by making annuity payments to J. Howard. ER 611-14, 2625. The tax benefit of this arrangement was to eliminate taxes on the ultimate transfer of the assets to the beneficiary of the GRAT because the GRAT would effectively pay for the assets over time. ER 2625, 5053. In the event J. Howard did not live for the five-year term of the GRAT, the GRAT would unwind and the shares would revert to J. Howard's Living Trust. ER 611-14. Although J. Howard anticipated in 1993

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[11] The stock that J. Howard gave to Pierce in this transaction came out of the Living Trust.

[12] The stock that J. Howard transferred to the GRAT also came out of the Living Trust.

that he would live for at least five more years, in fact he did not. ER 1098, 5062, 5804-09. The GRAT, however, paid dividends for the duration of its existence. ER 84-87, 5757-58.

Consistent with J. Howard's intent to keep all of his assets in the Living Trust, on January 13, 1994, J. Howard assigned his interest in the GRAT (i.e., his right to receive income from it) to the Living Trust. ER 2636, 3300-01, 3380. In March of 1994, following J. Howard's instructions, Hunter prepared an amendment to the GRAT following discovery of a technical error in the document. ER 4959-60. After Sorensen requested an explanation for the alteration, J. Howard executed an affidavit stating that the alteration had been made at his direction. ER 4960-61.

An important effect of the several transactions discussed above was to reduce J. Howard's ownership interest in MPI to 49.7%. ER 5252-53, 4982, 3383-84.[13] This was desirable for estate tax purposes, and was done at J. Howard's direction, because it reduced J. Howard's ownership interest in MPI to a minority position. ER 5252-53, 3382-84, 4982. For purposes of valuing a decedent's stock ownership for tax purposes, a majority position in a corporation typically carries a "control premium" – an increase in value to reflect the fact that the decedent controlled the corporation. ER 4981-82. Correspondingly, a minority position is typically entitled to a "minority discount" – a reduction in value to reflect the fact that the decedent did not control the corporation. ER 4981-82, 3383-84, 5252-53. By reducing his ownership interest to a

[13] As previously, J. Howard's MPI stock continued to be held in the Living Trust.

minority position, J. Howard effectively lowered the per-share value of his MPI stock for tax purposes, resulting in a tax savings. ER 4982-3, 5252-53, 3383-84. In order to fully relinquish his control, J. Howard also resigned as trustee of the voting trust that controlled MPI. ER 577, 2595-96, 5292.

F. Other Events Prior to the Marriage

Prior to their marriage, J. Howard and Vickie were often apart. ER 1462, 2604, 3394-95. Although she would call him frequently for money, she did not often visit him.[14] ER 2269-70, 2605. At times, J. Howard would fly to Los Angeles or New York to visit her. ER 2421, 2937, 2953, 2954.

During a trip to Los Angeles to visit Vickie prior to the marriage, Vickie claimed to have injured her leg and, during his visit, spent much of the time in bed wearing a cast. ER 2491-92, 2603-04, 2954. While J. Howard was taking a nap, however, his nurse, Betty Harding, came across Vickie in another room with the cast off and her arms and legs encircled in embrace around her housekeeper, giggling and rubbing noses. ER 2492-93, 2603-04, 2955. Later on during the visit, J. Howard went shopping with Harding to purchase jewelry for Vickie. ER 2493, 2957. When they returned with the jewelry, Vickie demanded to see the receipt and complained that J. Howard had not spent enough money on the purchase. ER 2493, 2957-58. J. Howard returned to the store to purchase more expensive jewelry. ER 2493-94, 2958.

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[14] Vickie referred to J. Howard as "Paw Paw." ER 3573, 3604. In public, she told others that he was her grandfather. ER 2603, 2931.

During a trip to New York, J. Howard waited in his hotel for several days only to have Vickie visit with him for thirty minutes. ER 2937, 3394-95. Just before he was scheduled to leave, Vickie asked that he meet her at an exclusive jewelry store, Harry Winston's. ER 2495-96, 3391, 3395-96. When J. Howard arrived at the store and met with Vickie, he was not interested in shopping. ER 3399. Vickie gave him a valium, leaving him incoherent and drooling in his wheelchair. ER 2495-96, 2943-44, 3392, 3397-00. She then had him buy her a 16-carat diamond engagement ring. ER 2753, 3400. On the return trip to Houston, J. Howard had heart palpitations, and Harding was concerned that, as a result of the valium, J. Howard might have died. ER 3391-2, 3402.

During the summer of 1994, members of J. Howard's staff learned that Vickie's "bodyguard," Pierre DeJean, had a record of multiple felony convictions. ER 681-90, 3426-27, 5318-22. Expressing their concern for J. Howard's safety, Eyvonne Scurlock (J. Howard's secretary) and Dan Hedges (one of J. Howard's attorneys) approached Pierce for authorization to arrange for surveillance of J. Howard. ER 3426-28, 5318-19. Pierce approved the request, and the surveillance was put in place. ER 3426-28, 5236-38.

Just prior to her marriage to J. Howard, Vickie "lost" much of the jewelry that J. Howard had given to her, including her engagement ring. ER 635, 2774-78. She filed a police report in Los Angeles, claiming the property had been stolen. ER 635. Contradicting her claim, she also asserted that she had given the jewelry to DeJean. ER 3592-94. Further contradicting her claim, she asserted

that she had left the jewelry in a bag in a cab. ER 3592-94. The jewelry has never been recovered. ER 2770, 3596.[15]

G. J. Howard's Additional Indebtedness to MPI

During 1993, J. Howard borrowed an additional $5.6 million from MPI, largely to fund his gift-giving to Vickie. ER 630, 633. Vickie thought of $50,000 as "pocket change." ER 2754. In order to obtain the money for Vickie, J. Howard would instruct Eyvonne Scurlock to borrow from MPI's line of credit. ER 1309-10, 2996-97. Scurlock would do so and then send the money to Vickie. ER 1303.

By the summer of 1994, Texas Commerce Bank was increasingly unwilling to permit the use of MPI's business line of credit to fund J. Howard's personal expenditures. ER 5306-07. By June of 1994, MPI had exhausted its entire line of credit, and had insufficient funds to pay its bills. ER 2256, 3078-79, 5295. At J. Howard's direction, Pierce and Finley Hilliard negotiated a $2.5 million extension of the line of credit, increasing the line from $15 million to $17.5 million. ER 3079, 5295-96. As a condition of this extension, Texas Commerce Bank required MPI to agree to reduce the outstanding balance on the line back to $15 million by January 30, 1995. ER 3097, 5297. The bank further required MPI to agree to reduce the line to $12 million by June 30, 1995. ER 3097, 5297.

As before, J. Howard was required to document his loans from MPI. ER 5611. To document outstanding

[15] The police did not believe Vickie's story, stating that "the report of lost jewelry is unfounded." ER 642.

indebtedness, J. Howard executed a note payable to MPI in the amount of $5,618,074 as of June 1, 1994 (the "June 1 Note"). ER 633. To assure payment of the $5.6 million note, J. Howard pledged the $17.5 million Pierce Note as collateral. ER 630. As a result, MPI was able to carry the $5.6 million loan on its books as a secured obligation, thus bolstering MPI's creditworthiness.

H. The Wedding

On June 27, 1994, J. Howard married Vickie at a ceremony in Houston. ER 5161. The wedding was attended by J. Howard's secretary, Scurlock, and one of his nurses, Charlotte Fade. ER 2990, 5161. Vickie's aunt and uncle also attended. ER 5161. Arnold Wyche, J. Howard's driver, brought J. Howard to the ceremony but did not attend. ER 2879, 5322. Pierce was not informed, and was unaware of the wedding, until July 11, 1994 when Dan Hedges told him that it had occurred. ER 2948-50, 5237-38.

The afternoon of the wedding, Vickie informed J. Howard that she had to leave that day for Greece for a photo session. ER 2801-02, 2976, 2983-84. Instead of travelling to Greece, however, Vickie flew back to Los Angeles. ER 2801-02, 2976, 2983-84.

I. J. Howard's Further Revisions to His Estate Plan

Shortly after the wedding, J. Howard called and met with Hunter to discuss certain "ante-nuptial" changes to his estate plan. ER 3248-50, 5064-65. J. Howard had three principal concerns that he wanted Hunter to address. First, he was concerned that, at some point during the marriage, he would become disabled. ER 2835, 3251, 3260-61.

J. Howard was worried that some of the people surrounding Vickie would attempt to gain control over his assets and interfere with his estate plan, ER 2835, 3251, 4965-66, 5065. J. Howard was aware that, if he were to become disabled, his wife would have priority to be named as his guardian. ER 2835-36, 5083. J. Howard wanted to structure matters so that Pierce would be in control of his estate, his estate plan would remain intact, and Vickie, or her advisers, would not gain control. ER 729-734, 4965-66, 5065, 5081-83. Previously, in 1992, J. Howard signed a document requesting that Pierce be appointed his guardian if a guardianship was ever warranted. ER 3189-90, 3259.

Second, J. Howard was concerned that Vickie was already receiving more than her share of any community property arising from their marriage. ER 3252-56, 5066. J. Howard continued to borrow money from MPI to fund his gifts to Vickie. ER 3252-56, 5569, 5610-11. He wanted to continue to provide for Vickie, and did not mind her receiving her share of any community property. ER 3253-54. At the same time, however, he did not want Vickie to be able to claim that, in addition to the funds he was giving her, she was entitled to more as her "community" interest. ER 3254, 5066. He was already borrowing for her benefit more than her share of the community, and he did not want her to be able to "double dip." ER 3254, 4964-66.[16]

[16] During the marriage, Vickie's "community property" share of J. Howard's income was approximately $1 million. ER 2539. In contrast, J. Howard borrowed many times this amount to fund his gift-giving to Vickie. Because she actually received far more than her share of any community property, Vickie has not made a community property claim.

Third, J. Howard wanted to confirm his estate plan. ER 2787-88, 2811-15. In particular, he wanted Pierce to "feel comfortable" that his marriage to Vickie was not changing his plan. ER 2811-2815, 2833-34, 2961-65, 3251-52, 3507-08, 3510, 4965, 5271-72. J. Howard intended to take care of Vickie through the support he was providing for her during his lifetime, and he wanted Pierce to remain as the primary beneficiary of his estate. ER 2959-60, 3088-99, 3291-96, 3390, 5265-67.

J. Howard instructed Hunter to implement his goals quickly. ER 3297-98. Returning to his office in Lake Charles, Louisiana, Hunter began preparing an outline of the relevant issues and how best to effectuate J. Howard's instructions (the "Fine Tuning Outline"). ER 5067, 5623-35. Hunter did not draft the outline in a single day. ER 5067. Instead, he created it over the course of many days as a working document that he updated and revised while working on revisions to J. Howard's estate plan. ER 5067.

Hunter did not share the Fine Tuning Outline with Pierce – or discuss J. Howard's plans with Pierce – because these involved J. Howard's affairs. ER 2294-95. Pierce did not actually see a copy of the Fine Tuning Outline until long after his father's death. ER 5248-49.

On July 12, 1994, Hunter met with J. Howard to present his ideas to implement J. Howard's instructions. ER 3262-67, 5239-40, 5241-46. Also in attendance at the meeting were two of his accountants Finley Hilliard and Nancy Koonce. ER 2633, 2669, 3264-65, 3538-39. They discussed making the Living Trust irrevocable. ER 3541-52, 5244. Hilliard explained the consequences of making the trust irrevocable, including that it would mean that Vickie would not be a beneficiary. ER 2669. J. Howard

understood and instructed that the trust be made irrevocable, stating that he would provide for Vickie in other ways. ER 2293, 2669, 5245-46.

J. Howard wanted to make the Living Trust irrevocable to protect his estate plan in the event he became disabled. ER 3250-51, 3265, 2596. J. Howard's concern was that, if he became disabled, a guardian might be able to revoke his estate plan if the trust were revocable. ER 3265. J. Howard also wanted to make his Living Trust irrevocable in order to prevent Vickie from claiming that the income that the trust earned, but did not distribute, was community property. ER 3253-56, 4964-66. By making the trust irrevocable, the income that the trust earned would not become community property, but could be used to pay his debts – only the funds that the trust actually distributed to J. Howard would become part of the community. ER 3256-58, 4965-66; *see Lemke v. Lemke*, 929 S.W.2d 662, 664 (Tex. App. 1996). J. Howard otherwise selected what he wanted done to his estate plan, and told Hunter to return the next day with documents for him to sign. ER 3267.

Hunter returned to his office and revised the Living Trust in accordance with J. Howard's instructions. ER 3267. At J. Howard's direction, Hunter also prepared a document granting Pierce power of attorney for J. Howard. ER 729-734, 2296, 2634-35 5081-83. Hunter, together with Hilliard, worked through the night to finish this work. They returned to meet with J. Howard on July 13, 1994. ER 3268-69.

J. Howard executed the revised Living Trust document, and Scurlock notarized his signature. ER 2589, 2669, 3269, 5073. J. Howard also executed the power of

attorney. ER 2634-35, 5081-83. Because Pierce was a co-trustee of the Living Trust (as he had been since 1982), Pierce also signed the Living Trust. ER 644-65. J. Howard was both the grantor and a trustee of the Living Trust. ER ER 5302. When J. Howard signed the Living Trust, he neglected to sign the separate acceptance of the oath of trustee. ER 3222, 5301. J. Howard subsequently signed the acceptance of the oath on July 15, and Scurlock notarized his signature. ER 3219, 5301.

At the time J. Howard executed his Living Trust, he was able to read. ER 2505, 2597, 3663. His daily routine included going to the office and reading the Wall Street Journal. ER 2597, 3647-48. J. Howard was fully competent and capable of understanding the transactions and documents that he was executing. ER 2410, 2633-34. J. Howard understood that he had made his Living Trust irrevocable. ER 2266, 2293, 2596, 2633-34, 2669.

After J. Howard executed the Living Trust, Jeff Townsend recorded it in Glasscock County, Texas. ER 5151-52. In addition, Townsend recorded the document in approximately 18 other counties, including Harris County (where J. Howard lived). ER 3639-40. Townsend recorded the document in the counties in which J. Howard had mineral and other interests in real property in order to give constructive notice of the Living Trust's ownership interests. ER 3639-40.

In 1994, J. Howard transferred to Vickie ownership of Compagnie Victoire by means of a transfer document that Vickie signed (the "Act of Donation"). ER 691-702. The Act of Donation stated that Compagnie Victoire owned the jewelry that J. Howard had purchased for Vickie's use, and copies of the jewelry receipts were attached. ER 691-702.

J. Howard also transferred title to the Tomball Ranch to Vickie, as well as title to the Mercedes that he had purchased for her use. ER 691-702.

J. Subsequent Events During the Marriage

In August of 1994, J. Howard flew to Los Angeles with his driver, Wyche, to visit Vickie for several days. ER 2888-96, 3598, 3649-52, 3653-62. During the visit, Vickie stayed in her room in her bed. ER 2888-97, 3649-52, 3653-62. When J. Howard suggested that he keep her company, she refused to allow him to lie next to her, stating that he would urinate in the bed. ER 2889, 3651. She remained in bed until J. Howard left. ER 2888-97, 3649-52, 3653-62. When he came to say goodbye, she asked him for money. ER 2894-95, 3660-62. He gave her his wallet and she took all of his cash, together with a blank check that she had him sign. ER 2895, 3660-62.

On another occasion, J. Howard asked Nurse Harding to take him to visit Vickie at the Tomball Ranch. ER 3414-15. At the ranch, Vickie asked Harding to leave J. Howard with her. ER 3415. Harding left, and drove to Scurlock's nearby home. ER 3415.

A short time later, Harding received a phone call from Vickie's aunt requesting that Harding come pick up J. Howard. ER 3415. Harding rushed back to the ranch. ER 3415. When she arrived, she found Vickie talking with her aunt in a car in the driveway. ER 3416. Harding found J. Howard in the house. ER 3416. His hair was standing up, his clothes were disheveled, and buttons were missing from his shirt. ER 3416-17. Although he would not tell Harding what happened, he made her promise that she would never again leave him alone with Vickie at her

house. ER 3417-18. He stated that his marriage to Vickie had been a mistake. ER 3418. He also stated that Vickie thought of him as a bottomless pit financially, which was not true. ER 3418. He stated that he wanted to teach Vickie how to handle her money, but all she wanted to do was spend. ER 3418.

At various times, Vickie pressed J. Howard to adopt her minor son, Daniel. ER 2614, 3429-30, 5721. J. Howard, however, never adopted Daniel. ER 2614, 3429-30. At one time, J. Howard sought advice as to whether he could conceive a child of his own with Vickie, but was informed that he could not. ER 5176-77.

In September of 1994, Vickie again took J. Howard jewelry shopping at Harry Winston's in Los Angeles. ER 5102-03, 3599. There, he wrote a check for approximately $1 million for jewelry purchases. ER 2658, 3599-3600, 5103. The bank, however, refused to honor it. ER 2275-76, 2297, 3517. Pierce received a call from J. Howard's bank, informing him that the bank would not honor the check. ER 2658, 2711. Pierce met with J. Howard and asked if J. Howard wanted to sell any assets to cover the check. ER 2335-36. J. Howard replied that he would not sell any assets and that the jewelry had to be sent back. ER 5103, 2616, 2658, 2711, 3518-20. J. Howard told Vickie to return the jewelry. ER 2275-76, 2316-34, 2616, 2711, 5103-04. Although Vickie told him that she would, she refused to do so. ER 2316-34, 2616, 5104-05. When Harry Winston's subsequently sued on the check, Pierce supervised the litigation. ER 1379.[17]

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[17] In settlement of certain subsequent litigation, Vickie agreed to return the jewelry and did so. ER 2316-18, 2329, 2616-17, 3601.

During Christmas of 1994, J. Howard again flew to Los Angeles with Wyche to visit Vickie. ER 3602, 3665-66. When he arrived at her house, Vickie was drunk and having a party with some friends. ER 3666. Soon after his arrival, she sent J. Howard to bed and continued on with her party. ER 3667.

On December 23, 1994, J. Howard gave Vickie a stuffed bear with an emerald pendant necklace. ER 3664-66. She served him breakfast. ER 3668-69. Because the bacon was raw, he avoided eating it. ER 3669-70. When she complained that he was not eating the food, he swallowed it. ER 3670. The raw bacon, however, made him sick. ER 3670.

That evening, Vickie insisted that J. Howard go out with her for dinner even though he did not feel well. ER 3671-72. While they were out, Vickie left J. Howard in his wheelchair in the rain. ER 2306, 3192-93. Afterwards she went dancing with her bodyguard, while Wyche stayed with J. Howard at the house. ER 3673-76.

On Christmas day, Vickie had Wyche take pictures of her and J. Howard. ER 3676-77. Although they posed together for pictures, she did not spend the day with him. ER 3677. Before J. Howard left, he gave her an envelope full of cash several inches thick. ER 3664-65, 3668, 3680.

After J. Howard returned to Houston, he became seriously ill and, in January of 1995, was hospitalized. ER 3413, 3420, 3681-82. Following his stay in the hospital, he returned to his home in Houston. ER 3683. J. Howard instructed his staff that, if his heart stopped or he stopped breathing, he did not want to be resuscitated. ER 3696,

3423-24. A sign to that effect was posted at his bedside. ER 3696.[18]

Vickie flew to Houston. ER 3684. While at J. Howard's house, she tried to feed him chicken soup. ER 2261. J. Howard had difficulty swallowing, and Vickie's feeding him the soup caused him to choke, and he lost consciousness. ER 2261-65. J. Howard's driver called 911, and eventually succeeded in reviving him. ER 2265.

During J. Howard's illness, Pierce and J. Howard's staff worried that J. Howard would die. ER 2271, 2807, 2971-72. J. Howard, however, recovered. ER 5762-63, 5228-30. In April of 1995, J. Howard was diagnosed with inoperable stomach cancer. ER 2946-47.[19]

K. Additional Estate Planning Transactions

From December of 1994 through May of 1995, J. Howard approved a final series of estate planning transactions. On December 28, 1994, following J. Howard's instructions, Pierce executed a document that renounced the right of J. Howard's estate to have the Living Trust pay the estate's debts (the "Act of Renunciation"). ER 703, 3067-68. The Act of Renunciation had no effect on J. Howard's ability to receive income from the Living Trust during his lifetime. ER 703, 3215. It only affected his

[18] During J. Howard's illness, Pierce removed him temporarily as a director of MPI due to his incapacity. ER 5750.

[19] The reason why the cancer was inoperable was because J. Howard had previously had gall bladder surgery and, at his age, his doctors did not wish to put him through another major surgery. ER 2918-20.

estate's right to recover from the Living Trust *after* J. Howard's death. ER 3215.

The signed Act of Renunciation was sent to Finley Hilliard, J. Howard's accountant. ER 5335. Hilliard subsequently executed his acknowledgement of receipt of the document on February 22, 1996. ER 5335.

On February 16, 1995, the trustees of the Living Trust agreed to change the situs of the Living Trust from Texas to Louisiana. ER 717. The actual transfer of assets occurred later. Subsequently, following litigation, the Louisiana Supreme Court concluded that Louisiana did not have jurisdiction over J. Howard's "succession" – meaning that Louisiana did not have jurisdiction over the distribution of his property. *See In re Howard Marshall Charitable Remainder Annuity Trust*, 709 So. 2d 662 (La. 1998).

On May 26, 1995, the Living Trust sold its remaining 63,051 shares of MPI stock to MPI in exchange for a private annuity. ER 768-71, 2636, 3278-84. For tax purposes, this transaction was a valid estate planning transaction provided that J. Howard's death was not "imminent." ER 3285, 3287-88. Under the then-prevailing legal standard, J. Howard's death was not imminent so long as the likelihood of his living for one year was 5% or greater, which it was. ER 3285-88, 5086-88; *Estate of Gordon B. McLendon v. Commissioner of Internal Revenue*, 135 F.3d 1017, 1022-23 n.7 (5th Cir. 1998). In addition, the GRAT sold its shares of MPI stock back to MPI in exchange for a note in the amount of $24,753,376 (the "MPI Note"). ER 3278-80.

One purpose for these transactions was to reduce J. Howard's estate taxes by freezing the value of MPI stock (which was appreciating). ER 3278-80. A second purpose

was to provide income for J. Howard. ER 2635-36, 5101. Although MPI could no longer borrow money to fund J. Howard's lifestyle, it might borrow funds to finance the buy-back of its stock. ER 5101-02. MPI has consistently made payments as required under the MPI Note. ER 5353.

In each of these transactions, the Living Trust received full consideration for the property that it transferred. ER 3374-76. J. Howard was provided with income to fund his lifestyle. ER 2635-36, 3279-81, 3284. In addition, his estate taxes were minimized. ER 2635-36, 3493. J. Howard furthered his longstanding goal of transferring his principal assets to Pierce. ER 3289-90, 3493. J. Howard was also able to provide millions in gifts to Vickie. ER 2406, 2636, 3492-93. Although J. Howard's gift-giving depleted his cash and left MPI in precarious financial straits, he avoided selling any of his principal assets. ER 3289-90. As a result, he was able to pass these assets along to Pierce, as he intended. ER 3289-90.

L. Guardianship Proceedings

On February 8, 1995, Pierce commenced guardianship proceedings for his father. ER 724-28. On February 16, 1995, the court appointed Pierce as temporary guardian of J. Howard's person. ER 742-45. On May 31, 1995, the court appointed Glenn Johnson as J. Howard's guardian *ad litem*. ER 788, 2254. In July, the court appointed Nurse Harding as his permanent guardian. ER 812-15. During the guardianship proceeding, J. Howard indicated that he wanted Pierce to remain as his guardian. ER 3440-41, 5143-46. During the guardianship proceeding, Pierce

continued to make payments to Vickie. ER 715, 719-22, 2300, 2316-20, 3080-81, 3524-25.[20]

On May 26, 1995, Vickie visited J. Howard at his Texas home, exposed her breasts, and asked him to repeat into a tape recorder that he intended to give her half of all of his assets. ER 760-761, 3698-3700, 5270-01. J. Howard refused. ER 5270-71. On August 4, 1995, J. Howard died of heart failure. ER 2661, 2807. He was ninety years old. ER 2808.

On the night before he died, J. Howard refused Vickie's phone call. ER 2809-10, 3434-35. During his marriage, J. Howard called Vickie daily, leaving messages for her to call him. ER 2605, 2795-96. She did not return his calls, contacting him only when she wanted money. ER 2399, 2605, 2795-96. During the last month of J. Howard's life, Vickie did not visit him in Houston. ER 2279, 3693. Although J. Howard clearly loved Vickie, he ultimately called her "unteachable." ER 3436. As Nurse Harding described J. Howard's experience with Vickie, "his year of being married to her was just a total long, lonely, frustrating, miserable existence." ER 2501.

During J. Howard's last days, Scurlock visited him and asked if he wanted to speak with counsel to make any changes to his estate plan. ER 3710-12. J. Howard said that he did not. ER 3710-12. As J. Howard repeatedly indicated since 1982, he wanted Pierce to have his principal assets. ER 3082, 3510, 2787-89. As he intended, J. Howard attempted to provide for Vickie through the gifts

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[20] Subsequently, when Vickie sued for a determination of the validity of the Living Trust (discussed below), J. Howard instructed Pierce to stop making payments to her.

that he actually gave her while he was alive. ER 2961-65, 2584, 3088-89, 5265-67, 5271-72.

At no time did Pierce interfere with his father's intentions. ER 2303-04, 2605, 4882-86, 4912-13, 5045, 5148-49, 5084-85. Even when Pierce disagreed with his father, Pierce carried out his instructions. ER 2337, 2605, 4882-86. As Vickie herself testified, J. Howard was always fully competent. ER 3569.

M. Vickie's Initiation of Proceedings in Texas

In April of 1995, several months prior to J. Howard's death, Vickie commenced proceedings in the Texas Probate Court against Pierce and others seeking a declaration regarding the validity of the Living Trust. ER 5620. Vickie alleged that Pierce had tortiously interfered with her property rights with respect to J. Howard's assets. ER 5615-17.

Three days after J. Howard died, Vickie filed a further application in the Probate Court to determine that J. Howard died without a will. ER 816-18. Pierce opposed Vickie's application and sought to admit his father's Will into probate. ER 836-45. Vickie thereafter contested the Will in the Probate Court. ER 5523-31.

Subsequently, Vickie amended her probate complaint to add a claim against Pierce, asserting that Pierce tortiously interfered with J. Howard's alleged intent to give her a gift from his assets. ER 2862-65. In filing her claim in the Probate Court, Vickie conceded the jurisdiction of the Probate Court over her claim. ER 2842.

Vickie was not the only person who contested J. Howard's estate plan in the Texas Probate Court. ER 857-70. Apart from Vickie, other parties also challenged J. Howard's written scheme for the distribution of his property, alleging various claims and rights. ER 857-70. These parties included Pierce's brother, Howard Jr., and various institutional claimants. ER 857-70, 1028-48, 2044-52.

The theories of the parties challenging the validity of the Living Trust clearly conflicted with the terms of the Living Trust. Vickie contended that she was entitled to one half of J. Howard's property. ER 2762-63, 3609-10. Howard Jr. claimed that he was entitled to a substantial share. ER 857-70. Certain institutional claimants contended that J. Howard had promised them large gifts. ER 1028-48, 2044-52. In contrast, the express provisions of the Living Trust gave most of J. Howard's assets to Pierce. ER 289-336.

Obviously, J. Howard could not have intended that virtually all of his assets should go to Pierce and yet, at the same time, virtually all of the same assets should go to others. As a result, the Probate Court was required to sort out which claims were valid and which were not in order to settle J. Howard's estate and quiet title to his assets.

N. The Probate Trial

Trial of the various claims and controversies involving J. Howard's estate plan and his intentions regarding the distribution of his assets began in the Texas Probate Court on September 18, 2000. ER 4706. The trial lasted for over five months, ending on March 1, 2001. *Id.* The Probate Court heard the testimony of over forty witnesses and received hundreds of items of evidence. ER 4066-71, 4706-27.

Just prior to trial, Vickie identified the causes of action against Pierce that she proposed to submit to the jury. ER 4073. These included her claim of tortious interference with a gift, as well as allegations of fraud, duress, and undue influence. ER 4076-78, 4086-90, 4102.

On October 2, 2000, Vickie's lead trial counsel, Tom Cunningham, delivered Vickie's opening argument. ER 4068, 4106. Among other things, he stated that "[t]his case is about tortious interference with an *inter vivos* gift." ER 4068, 4134. Vickie's counsel stated that Vickie would testify that J. Howard promised her "half of everything that he had." ER 4068, 4121.

In discussing the evidence that he intended to present, Vickie's counsel referred to the same "evidence" that Vickie would later rely on in pursuing her claim against Pierce in federal court: (a) Townsend's letter of December 15, 1992 mentioning a "catch-all trust"; (b) Sorensen's New Community Memo of December 23, 1992 discussing J. Howard's option idea; (c) the alleged firing of Sorensen as J. Howard's principal estate planning lawyer; (d) the estate planning transactions that took place in 1993; (e) Hunter's Fine Tuning Outline regarding estate plan changes that J. Howard wanted to make after his marriage to Vickie; (f) the execution of the Living Trust and power of attorney on July 13, 1994; and (g) the 1995 estate planning transactions. ER 4124-27, 4138, 4147, 4164-66.

As part of Vickie's case, she called seven witnesses, including Hunter. ER 4069-70. Vickie called three additional witnesses in rebuttal. ER 4070.

The Probate Court kept a running record of trial time consumed by the parties. ER 4070, 4173-75. The log revealed that Vickie's counsel spent 3590 minutes in the

examination of witnesses. ER 4070-71. This includes a total of 1031 minutes spent questioning Pierce. ER 4070. Vickie's counsel also questioned at least fourteen other witnesses, including Sorensen, Hunter, Koonce, Hilliard, Wyche, Townsend, Leticia Hunt (one of J. Howard's nurses), and Scurlock. ER 4070. All of the five witnesses that the District Court heard in its subsequent review of Vickie's claim (Hunter, Pierce, Sorensen, Vickie, and Townsend) testified in the Probate Court. ER 8, 4070-71, 4173-75.

Vickie identified Donald J. Fandry as an expert witness in her case. ER 3149-64.Vickie engaged Fandry to analyze whether the Living Trust was a forgery or had been altered. ER 3322-23. Fandry, however, did not testify at trial because he was not qualified as an expert witness. ER 3322-38. As a result, his proposed testimony was never subjected to cross-examination.

Howard Jr. identified J.L. Hale, Jr., as an expert witness in support of his case. ER 3322. Howard Jr. also engaged Hale to analyze whether the Living Trust was a forgery. ER 3322-24. Hale was only permitted to testify about the staple hole patterns in the document. ER 5767-90. He was not permitted to testify regarding other issues because, like Fandry, he did not qualify as an expert witness. ER 3322-38. Accordingly, other than with respect to the staple holes, his proposed testimony was not subject to cross-examination.

Pierce identified Jeanette Hunt as an expert in support of his defense. ER 3163. Hunt testified that J. Howard's signature on the Living Trust was genuine. ER 3002-03, 3004-05.

Vickie testified for approximately six days. ER 4071. She testified extensively regarding her alleged expectancy of a gift or inheritance, including her allegation that J. Howard promised to give her half of his assets. ER 4071. No other witness substantiated her testimony. ER 1304, 3606-10. Similarly, Vickie produced no documentary evidence of the alleged promise. ER 3611-12. Further, Vickie's testimony conflicted with other public statements that she had made that J. Howard did not intend to give her any such gift. ER 3634-35.

During trial, Vickie's conduct was so disruptive, and her testimony so obviously fabricated, that, at one point, the presiding judge directed her to stop making up stories and to "stop lying." ER 3613-14.

As part of the probate proceedings, Vickie accused Pierce of discovery abuse. ER 2516, 4725-27. In its final judgment, however, the Probate Court dismissed Vickie's allegations of discovery abuse as unfounded and unproven. *Id.*

O. The Probate Jury's Verdict

On March 7, 2001, the Texas jury returned its verdict upholding the validity of J. Howard's Living Trust and Will and rejecting the various claims seeking recoveries at odds with J. Howard's estate plan. ER 3719, 3735. In rendering its verdict, the Texas jury rejected all of the various allegations that the Living Trust and Will did not reflect J. Howard's true intentions. These included the allegation that the Living Trust had been forged or altered, that J. Howard had been the victim of fraud or undue influence, that Pierce had interfered with J. Howard's intent, and that J. Howard lacked the requisite

mental capacity when he executed his Will and Living Trust. ER 3718, 3720, 3736, 3761, 3773, 3782. The jury also specifically rejected Vickie's claim that J. Howard has promised her half of his assets. ER 3782.

P. The Probate Court's Judgment

On August 15, 2001, the Probate Court entered its final judgment, disposing of all claims and issues related to J. Howard's intended disposition of his property, including Vickie's claim. ER 4001. Subsequently, on December 7, 2001, the Probate Court entered its second amended final judgment (the "Probate Judgment"). ER 4706.

In entering its judgment, the Probate Court admitted J. Howard's Will to probate, finding the Will to be genuine and valid and not the product of improper conduct. ER 4714, 4715. The court also found the Living Trust to be genuine and valid and not the product of improper conduct. ER 4717.

With respect to Vickie, the court concluded that it had "exclusive" jurisdiction under Texas law over her claim and rights, including any claim regarding "the making *of any inter vivos or* testamentary gift or transfer by [J. Howard] of any of his property." ER 4712. The Probate Court further determined that any and all claims by Vickie regarding J. Howard and his property, "including but not limited to claims that [J. Howard] intended but failed to give her or to leave her any portion of such property during his life or upon his death, were required by law to have been asserted as compulsory counterclaims in this proceeding." ER 4720-21.

On the merits of Vickie's claim, the Probate Court specifically ruled that "[J. Howard] did not intend to give and did not give to [Vickie] a gift or bequest from the Estate of [J. Howard] or from the [Living Trust] either prior to or upon his death. . . ." ER 4721. The court further ruled "that [Vickie] does not possess any interest in and is not entitled to possession of any property within the Estate of [J. Howard] or any property [of the Living Trust] because of any representations, promises, or agreements. . . ." ER 4721.

The Probate Court also held that

(a) all of Vickie's claims were resolved and dismissed, ER 4719, 4721;

(b) Vickie was entitled to "take nothing" from Pierce, ER 4721; and

(c) Pierce was entitled to his inheritance free and clear of any claim by Vickie. ER 4718.

All of the foregoing matters were fully litigated in the probate case, including the Probate Court's jurisdictional determination and its conclusion that Vickie's claim was required to be brought in the probate proceeding. ER 4712, 4721, 2522-25, 2683-87.

Q. Vickie's Bankruptcy Case

During the pendency of the probate proceeding, Vickie's housekeeper obtained a sexual harassment judgment against her in the amount of $850,000.00. ER 2642. Allegedly unable to pay this judgment, on January 25, 1996 Vickie filed a voluntary chapter 11 bankruptcy case in Los Angeles. ER 2642.

At the time of J. Howard's death in 1995, Vickie had several homes and hundreds of thousands of dollars in her various bank accounts. ER 30 n.16. By the time of her bankruptcy filing six months later, she listed less than $7,000.00 in her bank account. ER 881.

After Vickie commenced her bankruptcy case, the United States Trustee joined in a motion requesting that a trustee be appointed to take control of Vickie's property owing to Vickie's inability to comply with bankruptcy procedures and manage her affairs. ER 871-914. The Bankruptcy Court refused to appoint a trustee. ER 933-35. Instead, the court appointed an examiner, who issued a report. ER 934-35, 963-87.

In her report, the examiner chronicled Vickie's inability to keep track of her finances and property. ER 971-80. The examiner also reported Vickie's reduced ability to work due to her propensity to abuse alcohol and drugs. ER 978, 983, 2413.

R. Vickie's Pursuit of Her Tortious Interference Claim Against Pierce in the Bankruptcy Court and Her Emergence from Bankruptcy

On June 14, 1996, Vickie asserted a claim against Pierce in the Bankruptcy Court alleging, among other things, that Pierce tortiously interfered with her expectancy of an inheritance or gift from J. Howard. ER 948-49. This claim is virtually identical to the tortious interference claim that Vickie filed in the Probate Court. *Compare* ER 948-49 *with* ER 2863-65.

Vickie filed her claim in the Bankruptcy Court as a "counterclaim" to a complaint that Pierce filed seeking a determination that a particular debt that Vickie might

owe to him would be nondischargeable in her bankruptcy case. ER 936. Specifically, in a separate proceeding in Texas, Pierce had sued Vickie and two of her attorneys for defamation. ER 5729. After Vickie filed her bankruptcy case, Pierce dismissed her from the suit without prejudice. ER 5740-42, 5743. One of the attorneys settled prior to trial of the defamation action. The other attorney tried the matter to a jury and lost. Specifically, the jury rendered an $8.5 million verdict against the attorney finding that the attorney published statements about Pierce that were slanderous and libelous, were not true, and were made with actual malice. Pierce subsequently settled the matter with the attorney.

With regard to Vickie, Pierce filed a complaint in the Bankruptcy Court seeking a determination that, in the event Vickie were found to be liable to Pierce for defamation, her liability would not be dischargeable in her bankruptcy proceeding. ER 922-32. In filing his complaint, Pierce did not request the Bankruptcy Court to determine whether Vickie was, in fact, liable for defamation. *Id.* Pierce simply asked the Bankruptcy Court to determine whether any liability that she might have would be nondischargeable (meaning that it would survive her bankruptcy). *Id.* Pierce also filed a proof of claim attaching the nondischargeability complaint. ER 5.

The Bankruptcy Court granted Vickie's motion for summary judgment on Pierce's nondischargeability complaint. ER 2756. Instead of resolving the narrow bankruptcy question of nondischargeability, the court summarily determined that Vickie had no liability for any defamatory conduct. ER 2757. After this ruling, the only claim remaining before the Bankruptcy Court was Vickie's tortious interference claim against Pierce. ER 2756.

On July 8, 1996, Pierce moved to dismiss Vickie's tortious interference claim for lack of subject matter jurisdiction. ER 957. On August 14, 1996, the Bankruptcy Court denied Pierce's motion. ER 3366.

On January 6, 1997, Pierce moved the Bankruptcy Court to abstain from considering Vickie's tortious interference claim. ER 1049-69. On January 29, 1997, the Bankruptcy Court denied Pierce's abstention motion. ER 3371.

On March 8, 1999 – while Vickie's claim for tortious interference remained pending – Vickie confirmed her chapter 11 plan of reorganization. ER 2200. Pursuant to the Bankruptcy Court's confirmation order, Vickie emerged from bankruptcy with a discharge of her preexisting debts. ER 2201. Specifically, the confirmation order provided that Vickie was discharged from her debts arising prior to the date of the confirmation of her plan. ER 2200-04.

S. The Bankruptcy Court's "Trial" and Judgment

After Vickie obtained her bankruptcy discharge, she continued to prosecute her tortious interference claim against Pierce in *both* the Texas Probate Court and the Bankruptcy Court in California. As a result, Pierce was forced to litigate the same claim at the same time in two separate proceedings.

In contrast to the Probate Court's five-month jury trial, the Bankruptcy Court conducted a five-day hearing on Vickie's tortious interference claim commencing on October 27, 1999. *Compare* ER 2642 *with* ER 4706. At the outset of the hearing, the Bankruptcy Court conducted a

press conference at which the court invited members of the press to ask questions in open court. ER 49-53. A reporter for Newsweek responded by taking the podium to ask questions. ER 2393-95, 5751-56. The Bankruptcy Court answered the questions and discussed the relationship between the bankruptcy proceedings and the then – pending proceedings in the probate court. ER 2393-95, 5751-56.

During the five days of hearings, the Bankruptcy Court essentially refused to permit Pierce to call his witnesses and put on his case by severely circumscribing the testimony and the presentation of evidence. ER 2173-75, 2641-49. Instead of permitting Pierce to try the issues, the court deemed that Vickie had established her expectancy, and likewise deemed that Pierce had interfered with it, precluding testimony and evidence contrary to the court's findings. ER 2173, 3049, 3052-53. As discussed more fully below, the court deemed these findings to exist as an unjustified discovery sanction against Pierce. ER 3052-53.

Nearly a year later, on September 27, 2000 – the eve of jury selection in the probate case – the Bankruptcy Court issued a decision concluding that Vickie had an expectancy of an *inheritance* based on her "widow's election" against J. Howard's estate, and that Pierce had interfered with her expectancy. ER 3032. The Bankruptcy Court awarded Vickie damages in the amount of $449,754,134. ER 3038.

A few days later, on October 6, 2000, the Bankruptcy Court *sua sponte* entered a revised opinion (the "Amended Opinion"). ER 3047. Abandoning the "widow's election" concept, the court deemed in its Amended Opinion that

Vickie had an expectancy of a *gift* from J. Howard, stating that Vickie "had an expectancy to receive a substantial portion of [J. Howard's] wealth." ER 3053.

Concluding on the basis of presumed facts that Pierce interfered with this expectancy of a gift, the Bankruptcy Court awarded Vickie damages in the amount of $449,754,134 – an amount identical to the court's earlier award under its different "widow's election" theory. ER 3049 n.5, 3055. The court calculated this award in part on its view of the increase in the price of oil. ER 3049 n.7. This method of calculation has no known relevance to the proceedings, as J. Howard did not receive any significant portion of his income from the production of oil, and there was no evidence that any increase in the price of oil generated any income to J. Howard.

On November 21, 2000, the Bankruptcy Court assessed punitive damages against Pierce in the amount of $25 million. ER 3243. On December 29, 2000, the Bankruptcy Court entered a judgment in Vickie's favor in the total amount of approximately $474 million (the "$474 Million Judgment"). ER 3360.

T. The Basis for the Bankruptcy Court's Judgment

The Bankruptcy Court based its $474 Million Judgment on presumed facts that it created as a "sanction" for Pierce's alleged discovery abuse, which allegations are unfounded and untrue. ER 3049 n.5, 3050-52. As a consequence of the alleged "abuse," the court issued sanctions orders that effectively resolved Vickie's claim in her favor.

The Bankruptcy Court entered its initial sanctions order on February 2, 1999 (the "Initial Sanctions Order").

ER 2172. Pursuant to this order, the court deemed various matters to be established for purposes of determining Vickie's claim against Pierce, including that J. Howard had intended to leave Vickie a substantial inheritance and that Pierce had tortiously interfered with her inheritance rights. ER 2173.

On appeal, the District Court vacated the Bankruptcy Court's sanctions order as without evidentiary support, and remanded. ER 2211, 5744-49. On May 20, 1999, the Bankruptcy Court simply reimposed its sanctions order in a form virtually identical to the order that the District Court had previously vacated (the only difference being the addition of footnotes) (the "Final Sanctions Order"). ER 2240. As a result of this sanctions order, Pierce was not permitted to put on his case in the Bankruptcy Court or to challenge any of the court's presumed findings. ER 2240.[21]

On January 18, 2000, well after the Bankruptcy Court concluded its five-day hearing at which Pierce was barred from presenting his case or challenging any of the presumed findings, the Bankruptcy Court *sua sponte* withdrew its Final Sanctions Order. ER 2927 Nevertheless, in entering its Amended Opinion and its $474 Million Judgment against Pierce, the Bankruptcy Court adhered to its presumed findings and specifically based its opinion on these presumed findings. ER 2646.

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[21] Both sanctions orders were drafted by Vickie's counsel. ER 2175, 2240.

U. The Alleged Basis for the Sanctions

In establishing the existence of Pierce's alleged discovery abuse, the Bankruptcy Court never conducted an evidentiary hearing. Nor did any witness ever testify as to the alleged abuses. Instead, following a series of status conferences, the court accepted as true the unsubstantiated and contested accusations of Vickie's counsel. The Bankruptcy Court based its sanctions on several categories of alleged discovery abuses.

1. Alleged Document Destruction

In its Amended Opinion, the Bankruptcy Court stated that "Pierce destroyed a substantial quantity of documents that were subject to a pending discovery request." ER 2644. The record, however, refutes this finding.

The only evidence of the destruction of any documents is Pierce's testimony in the probate proceeding. As a board member of Koch, Pierce routinely received confidential board materials from Koch, which he routinely destroyed in the ordinary course. ER 1024-27, 4061 Pierce's actual testimony was that the documents that he destroyed were copies (not originals) of certain minutes of Koch board meetings, board meeting agenda, and confidential board information. *Id.* Pierce also testified unequivocally that he did not destroy any communications with his father, memoranda prepared by his father, letters written by his father, or any communications with his father's attorneys. ER 1024-25. In addition, Pierce reconstructed the copies of the board materials that he destroyed and produced them. ER 2016, 4061.

There is no evidence that any of these documents were the subject of any pending discovery request in the bankruptcy case, or that they were in any way relevant to Vickie's claim.[22] In addition, the documents were readily available from other sources, including Koch itself.

In spite of the evidence and Pierce's testimony, Vickie relentlessly and falsely accused Pierce of being a destroyer of pertinent documents. *See*, *e.g.*, ER 1960 (stating the "Pierce admitted destruction of his father's personal correspondence"), ER 1842-43, (claiming that "[t]he Black Hole of documents that chronologically follow the expressed intention of Debtor's husband to provide for her remain 'missing,' withheld or destroyed.").

2. Alleged Failure to Serve Discovery Responses

In its Amended Opinion, the Bankruptcy Court also found that Pierce "failed to serve a written response within 30 days after the service of the request," and that Pierce did not serve any response "within any reasonable time thereafter." ER 2644. Again, the record refutes the court's finding.

On February 27, 1998, Vickie served on Pierce her first set of interrogatories. ER 1684. These included 340

[22] The only request propounded by Vickie relating to any Koch documents that the Bankruptcy Court required Pierce to respond to was her request number 85, which demanded "[a]ny and all documents which embody, refer or relate to communications since January 1990 between Plaintiff and any agent, or employee of Koch Industries, on the subject of Debtor, J. Howard Marshall, III, the J.H. Marshall, II Living Trust, or the purported succession of J.H. Marshall, II." ER 1010-11. None of the Koch documents that Pierce discarded were responsive to this request.

separate requests. ER 1684. Pierce's counsel contacted Vickie's counsel to discuss the overbreadth of the requests. ER 1532. On April 1, 1998, the parties conferred telephonically regarding Vickie's discovery. ER 1532. During the call, Vickie's counsel refused to withdraw any of the requests. ER 1532.

Pierce then undertook to answer the 340 interrogatory requests. ER 1532. His subsequent review and investigation took the better of two months to complete. ER 1532. On April 29, 1998, when Pierce's review and responses were nearly complete, Vickie's counsel sent a letter withdrawing all 340 interrogatory requests. ER 1532.

On November 8, 1996, Vickie propounded her first request for production of documents making 91 requests. ER 962, 987-1012. These requests were duplicative of documents that Vickie had already obtained through discovery in the probate proceeding. On November 20, 1996, at a meeting of counsel, Pierce produced over 300 pages of documents, including J. Howard's Will. ER 1264, 1274-75.

On December 12, 1996, Pierce filed his response objecting to many of Vickie's requests. ER 987. Because Vickie's requests were served by mail (which permits three additional days to respond), Pierce's response was one day late. *See* Fed. R. Bankr. P. 9006(f). In response to Pierce's objections to some of her requests, Vickie brought a motion to compel. ER 1082.

The Bankruptcy Court held a status conference on February 26, 1997. Even though Pierce had previously produced over 300 documents, Vickie stated falsely that "not one scrap of paper [has] been served on [Vickie] since they [sic]

day they were supposed to respond on the document production" and that the only thing that had been produced was a "pile of newspaper clippings." ER 1079-80.

On March 12, 1997, the court held a hearing on Pierce's objections to Vickie's production requests, together with Vickie's motion to compel. ER 1263. The Court significantly modified and narrowed many of Vickie's overbroad requests. ER 1265-71. Recognizing that Vickie had prevailed in part and that Pierce had prevailed in part, the court stated that "an award of sanctions [had] to recognize that neither side won an undivided victory on [the] motion." ER 1272-73, 1275-76. Nevertheless, the court imposed sanctions of $5,000 on Pierce, and none on Vickie. ER 1278.

On March 24, 1997, the Bankruptcy Court issued an order setting forth the categories of documents that Pierce was required to produce. ER 1280. In April 1997, Pierce produced 25 boxes of documents in compliance with the Court's order. ER 1389.

On February 27, 1998, Vickie served her second request for production of documents, comprising 115 additional requests. ER 1642. These were repetitive of her first 91 requests. ER 962, 987-1012. Counsel for Pierce and Vickie agreed that Pierce could have until May 6, 1998 to respond. ER 1708. On May 1, 1998, Pierce served his response. ER 1475.

On July 30, 1999, Vickie served her third request for production of documents. ER 2444. Nearly all of these requests were for privileged documents. ER 2444. Pierce served his response on September 2, 1999. ER 2444.

3. Alleged Failure to Produce Privilege Log and Documents for *In Camera* Review

In its Amended Opinion, the Bankruptcy Court found that Pierce failed to properly produce a privilege log, and failed to produce documents for *in camera* inspection. ER 2644. The record demonstrates that this is also untrue.

Pierce produced his first privilege log on May 2, 1997, in response to Vickie's first request for production of documents. ER 1291. In November of 1997, Pierce located additional documents and supplemented his privilege log. ER 1421. Vickie did not complain of any insufficiency in Pierce's log until February of 1998 when she moved to strike Pierce's answer. ER 1341. On June 15, 1998, Pierce amended his privilege log. ER 1730, 1772-81. On November 20, 1998, in response to the court's request, Pierce provided a revised privilege log. ER 2059, 2066-2119. The revised privilege log set forth the date, author, recipient, claimed privilege, ownership of privilege, and subject of each privileged document. ER 2066.

On May 5, 1998, the court ordered Pierce to produce his privileged documents for *in camera* review. ER 1723-26. On July 2, 1998 Pierce produced all of his privileged documents to the court. ER 1826-27.

4. The Hunter Documents

In its Amended Opinion, the Bankruptcy Court found that Pierce committed discovery abuse because he failed to produce documents in the possession of Edwin Hunter, J. Howard's estate planning lawyer. ER 2645. The record demonstrates that Pierce made every effort to have these documents produced and that they were, in fact, ultimately produced. Moreover, the record demonstrates that

the reason why these documents were not produced initially was because Vickie failed to comply with applicable procedures to obtain them, and made false statements to the Bankruptcy Court regarding her efforts to do so.

The Bankruptcy Court's order of March 24, 1997 directed Pierce to produce documents in Hunter's possession, including papers that had belonged to J. Howard. ER 1906. Pierce asked Hunter to produce these documents. ER 1901-02. Hunter asserted that he could not produce the documents voluntarily for two reasons. First, Hunter did not represent Pierce and the documents in question belonged to persons other than Pierce, including J. Howard's documents, which belonged to his estate. ER 1900, 1903. Second, many of the documents were covered by the attorney-client privilege held by someone other than Pierce, including Robert MacIntyre, the administrator of J. Howard's estate. ER 1900-03.

On January 19, 1998, Vickie served Hunter with a subpoena *duces tecum* issued from the United States Bankruptcy Court for the Eastern District of Texas. ER 1895. Hunter lived and worked in Louisiana, and the subpoena was improper. On February 2, 1998, Hunter objected to the subpoena. ER 1896. Nevertheless, at Pierce's request, Hunter voluntarily produced over 65,000 pages of documents and provided a privilege log. ER 1896.

On February 17, 1998, Vickie filed a motion to strike Pierce's answer to her complaint, alleging failure to comply with discovery. ER 1341.

On March 10, 1998, the Bankruptcy Court held a brief impromptu discovery conference. ER 1436. At the hearing, Vickie falsely stated through counsel that she was not receiving any documents from Hunter. ER 1438-39, 5736-39.

In fact, at the time that Vickie's counsel in California was complaining to the Bankruptcy Court that Hunter had not produced anything, Vickie's other counsel in Texas was reviewing and marking documents for copying from Hunter's production. ER 1530-31.

At the March 10 conference, Pierce agreed to assist Vickie in obtaining non-privileged documents from third parties, including Hunter. ER 1441-48, 1530. Pierce contacted Hunter and asked that he provide the documents that she requested. ER 1442-43, 1530-31.

On May 5, 1998, the Bankruptcy Court held a further hearing on Vickie's motion to strike Pierce's answer and impose discovery sanctions. ER 1716. During the hearing, Vickie argued that she should not have to comply with applicable procedures to compel production from Hunter. ER 1719-22. Vickie also complained about Hunter's privilege log. ER 1721-22. Even though Pierce had no control over Hunter or his privilege log, the court ordered Pierce to have Hunter annotate his privilege log more completely and to produce the privileged documents for *in camera* inspection. ER 1723-26.

After the hearing, Pierce contacted Hunter and asked him to cooperate. ER 1897. Hunter directed that his privilege log be annotated. ER 1897. Hunter also prepared 26 boxes of privileged documents for shipping to the Court for *in camera* review. ER 1901. Hunter became concerned, however, that he could be viewed as breaching his professional obligations to his clients who had not waived their privileges if he sent documents without a court order. ER 1901. Hunter attempted to obtain permission for release of the documents, but failed. *Id.* As a result, Hunter informed Pierce that he could not comply with the production of

privileged documents absent a court order. *Id.* Pierce asked Hunter to reconsider. *Id.*

On July 1, 1998, Hunter sought a protective order from the Bankruptcy Court in Beaumont, Texas clarifying his obligations. ER 1898. The Beaumont court concluded, however, that it lacked jurisdiction because Vickie never filed a motion to compel compliance with the subpoena. *Id.*

On August 27, 1998, the Bankruptcy Court held a further hearing. ER 2007. At the hearing, Vickie urged the court to sanction Pierce for Hunter's failure to produce documents. ER 2012-15. The court inquired of Vickie's counsel about the status of the Beaumont subpoena. ER 2009-11.

In response, Vickie's counsel stated falsely that he had made a motion to compel in the Beaumont court, which was pending. ER 2011. In fact, no such motion was ever made. ER 2784. The court stated: "I think that [Vickie] should proceed with respect to the subpoena issued by the . . . Beaumont court for any documents that Mr. Hunter has not produced and that's the forum where that should be litigated." ER 2017.

On October 29, 1998, the Bankruptcy Court held another hearing. ER 2053. Again, Vickie's counsel falsely stated: "I don't have to hang around Beaumont to know I'm not going to get anything there, but we're going to take every step we can take." ER 2056. In fact, Vickie took no further steps in Beaumont.

In March of 1999, Robert MacIntyre, the administrator of J. Howard's estate, agreed to waive the estate's privilege and Hunter produced 200 boxes of documents for Vickie's review. ER 2216, 2232.

5. Townsend Documents and Privilege Determinations

In addition to Hunter, Vickie sought the production of documents in the possession of Townsend, another of J. Howard's attorneys. ER 1348. In its Amended Opinion, the Bankruptcy Court found that Pierce should be sanctioned because Hunter and Townsend did not properly assert any claim of privilege. ER 2646. The record demonstrates that Pierce had no control over any assertion of privilege by Hunter or Townsend or the production of documents in their possession. Moreover, the Bankruptcy Court never afforded Pierce any opportunity to defend any claim of privilege.

Although Vickie never served Townsend with a subpoena, Townsend agreed to produce the documents in his possession, other than privileged materials. Vickie's counsel reviewed these documents on April 22 and 23, 1998. ER 1531. On July 2, 1998, Pierce produced additional Townsend documents. ER 1826-28. Like Hunter, Townsend initially declined to produce various documents because they did not belong to Pierce, and MacIntyre, the administrator of J. Howard's estate, would not waive the estate's privilege. ER 1731, 1814. As with Hunter, Vickie did not seek to compel Townsend to produce any documents.

On October 29, 1998, the Bankruptcy Court ordered Pierce to produce the privileged Townsend documents for *in camera* inspection, stating that if he failed to do so at the next hearing his counsel should "bring a toothbrush." ER 2054-55. On or before November 24, 1998, Pierce produced to the court the privileged Townsend documents. ER 2147. The court then advised counsel that there would

be no opportunity to argue whether a particular document was privileged, stating "the opportunity to be heard has passed." ER 2150. In fact, neither Pierce nor any other party was ever afforded an opportunity to be heard on the question of privilege.

On January 12, 1999, without opportunity for argument, the Bankruptcy Court, after its own review, turned over to Vickie all documents that the Court deemed were not subject to a valid claim of privilege. ER 2155-57. The court then sanctioned Pierce's counsel $5,000 for Townsend's allegedly claiming a privilege in bad faith. ER 2159. Pierce's counsel, however, had no authority or opportunity to review the Townsend documents prior to their submission to the court or to make any claim of privilege. ER 2161. Nonetheless, the court imposed the sanction stating: "It doesn't matter." ER 2162.

On January 22, 1999, the Bankruptcy Court sanctioned Pierce's counsel $15,000 without notice for allegedly dumping the Townsend documents on the court for *in camera* review without properly reviewing them ahead of time. ER 2163. In fact, Pierce's counsel was not responsible for the production and had no opportunity or authority to review these documents. ER 2160.

V. Withdrawal of the Reference and Initial District Court Proceedings

In September of 1998, Pierce moved to withdraw the litigation from the Bankruptcy Court to the District Court. ER 2019. On October 19, 1998, the District Court (Keller, J.) withdrew the matter, but left the Bankruptcy Court free to resolve *pending* discovery disputes. ER 2038-39, 2043. At the hearing, the District Court remarked: "As I

view this case overall, . . . essentially we are talking about a probate lawsuit here. Okay? And this should be resolved . . . in the Probate Court in Texas." ER 2036-37.

On January 12, 1999, the Bankruptcy Court indicated that it intended to submit a secret memorandum to the District Judge "to assist in his review of the matter." ER 2158. The District Court subsequently acknowledged on the record receiving the Bankruptcy Court's secret memorandum. ER 2207-08. The contents of this memorandum have never been disclosed.

On February 1, 1999, the District Court stayed the Bankruptcy Court's previous sanctions orders. In defiance of the District Court's stay, however, the Bankruptcy Court declared on February 2, 1999 that the District Court's order was ineffective. ER 2172, 2178, 2186-88. The Bankruptcy Court then entered its Initial Sanctions Order deeming various matters to be established for purposes of determining Vickie's tortious interference claim against Pierce. ER 2172.

On March 9, 1998, the District Court vacated the Initial Sanctions Order. ER 2209, 2211. At the hearing, the District Court remarked: "This is being over litigated and being litigated in the wrong forum. This is first and foremost a Texas probate case." ER 2206.

The District Court then vacated its prior withdrawal of the litigation, sending the matter back to the Bankruptcy Court. ER 2211. On May 20, 1999, the Bankruptcy Court reimposed its vacated sanctions order against Pierce by entering its Final Sanctions Order deeming Vickie's allegations against Pierce to be established for purposes of Vickie's tortious interference claim. ER 2235, 2240. Thereafter, as set forth above, the Bankruptcy Court entered its

$474 million judgment against Pierce based on presumed findings of fact.

W. Vickie's Unsuccessful Attempt to Withdraw from the Probate Case

After the Bankruptcy Court issued its $474 Million Judgment against Pierce on Vickie's claim, Vickie attempted unsuccessfully to withdraw from the ongoing Texas probate proceeding. ER 4713. On January 5, 2001, she filed a "nonsuit" of her tortious interference claim against Pierce in the Texas case. ER 4713.[23] Vickie also moved to dismiss the various counterclaims that Pierce had filed against her in the Texas proceeding, and, on January 17, 2001, the probate judge denied Vickie's motion to dismiss. ER 3446, 3472.

On February 9, 2001, Pierce, with leave of court, filed amended counterclaims against Vickie in the Probate Court, including a request for declaratory relief to determine Vickie's rights in J. Howard's property and estate. ER 2196-97, 3620. In entering its judgment (as set forth in greater detail above), the Probate Court rejected Vickie's claim that J. Howard intended to give her a gift, and ruled in Pierce's favor on his declaratory judgment claim seeking a determination of Vickie's claims. ER 4713, 4721-23.

X. The Bankruptcy Court's Injunctions

After the Bankruptcy Court entered the $474 Million Judgment, Vickie requested and obtained a series of

[23] A "nonsuit" is the equivalent of a voluntary dismissal of a claim. *Compare* Tex. R. Civ. P. 162, 163 *with* Fed. R. Civ. P. 41(a).

injunctions from the Bankruptcy Court enjoining ongoing proceedings in the Probate Court concerning Vickie. ER 3807-16. Subsequently, the Probate Court entered an injunction of its own prohibiting Vickie from enforcing the Bankruptcy Court's injunctions. ER 3922. On August 13, 2001, the District Court reversed the Bankruptcy Court's injunctions. ER 3989.

As part of its Probate Judgment resolving all controversies over J. Howard's assets and estate plan, the Probate Court awarded Pierce approximately $541,000 in attorneys' fees against Vickie based exclusively on events occurring during the probate trial after Vickie obtained her bankruptcy discharge. ER 4723. Following the entry of this award, Vickie sought relief in the Bankruptcy Court to enjoin enforcement of the Probate Court's award of attorneys' fees. ER 4032. On February 26, 2002, the Bankruptcy Court ruled that the Probate Court's award of attorney's fees violated Vickie's bankruptcy discharge. ER 5369. On appeal, the District Court affirmed. ER 5500. Pierce's appeal of the District Court's affirmance is presently pending in this Court. *See In re Vickie Lynn Marshall,* case no. 02-56603.

Y. The District Court's Reversal of the Bankruptcy Court's $474 Million Judgment, and its Ruling on Subject Matter Jurisdiction and the Probate Exception

On June 20, 2001, the District Court (Carter, J.) vacated the Bankruptcy Court's $474 Million Judgment, citing the Bankruptcy Court's lack of plenary jurisdiction to enter a final order resolving Vickie's tortious interference

claim. ER 120-21, *see also* 3821-3921.[24] At the same time, the District Court refused to dismiss Vickie's claim, concluding that it had plenary bankruptcy jurisdiction to determine her claim *de novo,* and that the Probate Exception to federal court jurisdiction did not apply. ER 109-10, 120-21.

Z. The District Court's Resolution of Pierce's Motion to Dismiss on Grounds of Claim Preclusion and Issue Preclusion

Following the Texas Probate Court's entry of the Probate Judgment, Pierce filed a motion in the District Court to dismiss Vickie's tortious interference claim on grounds of claim preclusion and issue preclusion. ER 83, 86. On December 11, 2001, the District Court heard argument on Pierce's motion. ER 4762-815. On the same day, the District Court also commenced its *de novo* hearing on Vickie's tortious interference claim. ER 4, 8, 4815. On December 21, 2001, the court denied Pierce's motion. ER 82, 93.

AA. Discovery in the District Court

Prior to conducting its *de novo* review of Vickie's claim, the District Court ordered Pierce to deposit with the court all of his documents and files relating to the case, including all privileged files of his counsel. ER 4063. Subsequently, the court directed Pierce to bring these

[24] Although Judge Keller had previously been assigned the matter in the District Court, Pierce's appeal of the Bankruptcy Court's judgment was assigned to Judge Carter, who presided over all subsequent hearings in the District Court.

materials to a designated warehouse location. *Id.* In response, Pierce prepared hundreds of boxes of materials. *Id.*

On the date Pierce delivered the materials, the presiding District Judge appeared at the warehouse and, over Pierce's objection, summarily handed over all of Pierce's documents to Vickie's counsel, including all counsel files. *Id.* In doing so, the court deemed Pierce to have waived any privilege. ER 4064.

BB. The District Court's Hearing and Judgment

In preparation for the District Court's *de novo* hearing on Vickie's claim, Pierce submitted a list of percipient witnesses that he planned to call, together with a summary of their testimony. ER 4671-83. Vickie submitted a list of witnesses jointly with Pierce's submission. ER 4667-70.

The District Court initially indicated [sic] the witnesses that it would hear, which did not include many of Pierce's percipient witnesses. ER 4024, 4671-83. At the commencement of the hearing, Pierce summarized the testimony of his percipient witnesses that he requested the court to hear. ER 4671-83, 4839-73.

During the proceeding, after the District Court heard from several witnesses, the court inquired whether Vickie desired to call any of the other witnesses on her list, running through her list name by name, which additional witnesses Vickie stated she did not wish to call. ER 5274-79. The court also ran through the list of percipient witnesses that Pierce requested, stating its understanding that Pierce wished to call additional witnesses, and also

stating that the court did not intend to hear these witnesses. ER 5280-87. At other times during the proceeding, the District Court stated that it understood that Pierce was requesting the opportunity to put on the live testimony of additional percipient witnesses, but that the court was not inclined to permit Pierce that opportunity. ER 5092, 5106, 5147, 5256-57.

Pierce's proposed percipient witnesses who testified in the probate proceeding, but whom the District Court refused to hear, included:

(a) Finley Hilliard, J. Howard's accountant of many years, who would have testified regarding J. Howard's intentions and that, among other things, it was J. Howard's decision to make the Living Trust irrevocable without provision for Vickie and that J. Howard was fully aware of what he was doing and the consequences of his action, ER 4678-79, 3971-73;

(b) Nancy Koonce, another accountant, who was present when J. Howard made the decision to make the Living Trust irrevocable without provision for Vickie and would have testified that this was J. Howard's decision, ER 4678-79, 3974;

(c) Betty Morgan Harding, J. Howard's long-time nurse and confidant, who would have testified about J. Howard's condition, his intentions, and Vickie's mistreatment of J. Howard, ER 3982-85, 4679;

(d) Eyvonne Scurlock, J. Howard's secretary of many years, who would have testified about J. Howard's intentions and that J. Howard executed the Living Trust as his own free act and deed, ER 3963, 4678;

(e) Arnold Wyche, J. Howard's driver, who would have testified about the relationship between Vickie and J. Howard, ER 3975-76, 4680-81; and

(f) Leticia Hunt, one of J. Howard's nurses in his final months, who would have testified about events in J. Howard's and Vickie's relationship and J. Howard's intentions toward Vickie, ER 3981, 4681.

As the District Court indicated, issues of credibility were critical to its deliberations. ER 5091. Yet, instead of hearing the live testimony of these and other percipient witnesses on key facts, the court indicated that it would rely on its review of secondary materials, such as deposition transcripts, and the probate proceeding. ER 5259. Pierce explained that the deposition transcripts were particularly inappropriate as a substitute for live testimony because, among other reasons, the transcripts did not reflect testimony elicited upon Pierce's questioning. *Id.* Over Pierce's objection, the District Court also curtailed Pierce's examination of Vickie, particularly concerning contradictory statements she made regarding her expectancy of a gift. ER 5190-91, 5193-95.

On January 8, 2002, the District Court heard argument on Pierce's contention that Texas does not recognize a cause of action for tortious interference with an expectancy of a gift. ER 5364-67. Pierce filed a brief on this issue in the District Court on January 8, 2002. ER 5355. Pierce also argued to the District Court at other times that Texas law does not recognize a cause of action for tortious interference with an expectancy of a gift. ER 4797.

On March 7, 2002, the District Court entered its judgment against Pierce, awarding Vickie $88,585,534.66

in compensatory and punitive damages. ER 5385. At the same time, the District Court denied Pierce's motion to reconsider its prior ruling on claim preclusion and issue preclusion. ER 5387.

In rendering its judgment, the District Court predicted that the Texas Supreme Court would recognize a cause of action for tortious interference with an expectancy of a gift. ER 69-70. Applying this theory, the court determined that J. Howard intended to give Vickie a large gift of some kind, and that "he wanted Vickie to have the benefit of the gift after he had passed away." ER 34.

The court further concluded that Pierce tortiously interfered with J. Howard's intentions by engaging in illegitimate "estate planning transactions for J. Howard." *Id.* at 73. Among other things, the court determined that Pierce had altered the Living Trust and that it was a forgery, ER 65 – a contention rejected by the Probate Court, which determined that the Living Trust was genuine, valid, and untainted by misconduct. ER 4717.

In entering its judgment, the District Court concluded that it would not reach the issue of whether Pierce committed any discovery abuse. ER 8-9. Accordingly, the court expressly declined to consider the appropriateness of the Bankruptcy Court's sanctions. *Id.*

On May 2, 2002, the District Court denied Vickie's motion to alter or amend its judgment to increase Vickie's award. ER 126. On June 3, 2002, Pierce filed a timely notice of appeal seeking review of the District Court's judgment in this Court. ER 5492.

* * *

IV. The District Court Violated Pierce's Due Process Rights.

As the Supreme Court has stated, "[t]he one who decides must hear." *Morgan v. United* States, 298 U.S. 468, 481 (1936). As Justice Frankfurter explained, the ancient maxim "[a]udi alteram partem – hear the other side! – a demand made insistently through the centuries, is now a command spoken with the voice of the Due Process Clause." *Caritativo v. California,* 357 U.S. 549, 558 (1958) (Frankfurter, J., dissenting).[27]

In this case, the District Court violated Pierce's due process rights by refusing to allow Pierce to call percipient witnesses that would have testified in his favor. Although the District Court permitted Vickie to call all of the witnesses that she wanted to call, the court denied Pierce the reciprocal opportunity. As a result, the proceeding was fundamentally unfair. Indeed, Pierce has never had the chance to fully and fairly present his case in any federal proceeding. Moreover, instead of permitting Pierce to

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[27] This maxim is truly ancient. As one court has put it: "The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man upon such an occasion, that even God himself did not pass sentence upon Adam, before he was called upon to make his defence." *The King v. The Chancellor, Masters and Scholars of the University of Cambridge,* 1 Str. 557, 567, 93 Eng. Rep. 698, 704 (1723); *see Phillips v. Crown Cent. Petroleum Corp.,* 556 F.2d 702, 705 (4th Cir. 1977) ("One must hear before one decides. Audi alteram partem is a fundamental rule of procedural fairness."); *NLRB v. Supreme Bedding & Furniture Mfg. Co.,* 196 F.2d 997, 998 (5th Cir. 1952) ("[A]udi alteram partem. It is this promise which, in a judicial or quasi-judicial hearing, demands and, if kept, insures as far as is humanly possible that 'knowledge will precede understanding, understanding will precede judging,' and the judgment will be impartial and just."); Kelley, *Audi Alteram Partem,* 9 Natural Law Forum 103 (1964) (tracing maxim).

present his case, the court engaged in impermissible review of the probate proceedings. As a result, the District Court's judgment must be set aside.

As the District Court conceded, its view of the credibility of the witnesses was critical to its decision. By excluding Pierce's witnesses, however, the court denied Pierce the opportunity to corroborate both his testimony and the testimony of other critical witnesses that the court disregarded. The court also denied Pierce the opportunity to rebut the court's innumerable inferences and speculations about critical events.

Although the court may have reviewed certain depositions taken in connection with the probate trial, the depositions typically did not include questioning by counsel for Pierce. Thus, the testimony was not full and complete and, in any event, was no substitute for the live testimony that the District Court heard at Vickie's request. The court also relied on its review of such items as entries from billing statements, but did not take any testimony from the authors of those entries. ER 8, 38. This is important because their testimony would have disproved the court's inferences.

Over forty witnesses testified in the Probate Court in a complete airing of all the issues. After hearing all of the evidence, the Texas jury reached a verdict diametrically opposed to the District Court's judgment. Pierce respectfully submits that, if the District Court had heard all of the witnesses and evidence, it would have reached the same conclusion as the Texas court.

The District Court conducted what it styled a "*de novo*" review of Vickie's claim. ER 3, 68. In doing so, the court directed that it would rely in large part on the record

in the Bankruptcy Court. ER 4, 7, 9. As discussed previously, however, the five-day proceeding in the Bankruptcy Court was severely truncated, with the most critical facts "deemed" to exist in Vickie's favor. Accordingly, the bankruptcy proceedings offered only a meager record from which the District Court might conduct its analysis.

The District Court also directed that it would rely on the record in the Probate Court, which constituted a much richer source of information. ER 8. At the same time, however, the District Court refused to be bound by any of the Probate Court's rulings, including its factual determinations. Inevitably, this placed the District Court in the position of sitting in direct review of the probate proceeding with complete discretion to substitute its judgment for that of the Probate Court and jury. As indicated previously, this constituted a clear violation of the *Rooker-Feldman* doctrine. Moreover, because the District Court revisited issues resolved by the Texas jury (e.g., the validity of J. Howard's estate plan), its review also violated the Seventh Amendment. *See* U.S. Const., Seventh Amend. (proscribing review of jury verdicts except as permitted at common law).

The Probate Court determined on the basis of a proper proceeding and a jury verdict that J. Howard never intended to give Vickie a gift; that his estate planning instruments were valid and untainted by misconduct; and that Vickie had no claim against Pierce. If the District Court wished to revisit these determinations (and was not otherwise barred from doing so), it was required to conduct its own complete trial. This included permitting Pierce to put on his entire case in his defense.

The District Court further erred by considering the statements of two individuals, Donald J. Fandry and J.L. Hale, Jr., regarding Vickie's allegations that the Living Trust had been improperly altered or forged. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). Neither individual was qualified as an expert, and the District Court never conducted a hearing to determine the reliability of their statements. *See Mukhtar v. California State Univ.*, 299 F.3d 1053, 1066 (9th Cir. 2002) ("some . . . reliability determination must be apparent from the record before we can uphold a district court's decision to admit expert testimony"), *amended*, 319 F.3d 1073 (9th Cir. 2003) (internal quotation omitted); *see also Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137, 158-59 (1999) (Scalia, J., concurring) (" . . . discretion in choosing the manner of testing expert reliability . . . is not discretion to abandon the gatekeeping function").

Moreover, neither Fandry nor Hale actually testified in *any* court on the issues that the District Court accepted as true. Thus, they were not subject to cross-examination. Nor could the court assess their credibility. Accordingly, the court improperly considered their hearsay statements to conclude that the Living Trust was altered or forged. *See* Fed. R. Evid. 801, 802, & 702; *Daubert*, 509 U.S. at 595 (noting the importance of "[v]igorous cross-examination" to guard against "shaky" evidence). In addition to violating applicable legal standards, the District Court's consideration of the statements of Fandry and Hale was also plain error. *See* Fed. R. Evid. 103(d); *Beachy v. Boise Cascade Corp.*, 191 F.3d 1010, 1016 (9th Cir. 1999) (standard for plain error).

The District Court also violated Pierce's due process rights when, without notice, it summarily ruled without a

hearing on October 23, 2001 that Pierce had waived his attorney-client privilege and handed Pierce's privileged communications to opposing counsel. To comply with the court's earlier order, Pierce had arranged for delivery of over 400 boxes of documents, including the files of Pierce's counsel in the probate case, to a warehouse in El Segundo, California. Although the court had assured Pierce that it would review the files of Pierce's counsel *in camera* to make a privilege determination, the court simply ruled – without any review – that Vickie's counsel could have access to all of them. This was also error, and the District Court's judgment must be set aside.

V. The District Court's Factual Determinations Are Clearly Erroneous.

Finally, the Court should reverse the District Court's judgment because the court's factual determinations are contrary to the record, are unsupported by it, and are based on improper speculation and inference.

In order for Vickie to prevail on her claim of tortious interference with an expectancy of a gift (assuming that such a cause of action exists), she was required to demonstrate at least three factual predicates: (a) J. Howard intended to give her a gift (other than the gifts that he actually gave her during his lifetime); (b) Pierce thwarted J. Howard's intent by independently tortious means; and (c) Vickie has suffered damages. As the Probate Court held, the evidence demonstrates that J. Howard did not intent to give Vickie a gift (other than the gifts that he actually gave to her during his lifetime). In addition, the evidence shows that Pierce did not thwart J. Howard's intent, and that Vickie has suffered no damages.

In concluding otherwise, the District Court improperly converted its authority to reject the credibility of all of the witnesses (including Vickie) into the power to create facts that are not in evidence. *See Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 512 (1984) ("when the testimony of a witness is not believed, the trier of fact may simply disregard it" but "the discredited testimony is not considered a sufficient basis for drawing a contrary conclusion."); *Moore v. Chesapeake & O. Ry. Co.*, 340 U.S. 573, 576 (1951) ("disbelief of testimony would not supply a want of proof"); *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1057 (9th Cir. 1990) ("discredited testimony is not [normally] considered a sufficient basis for drawing a contrary conclusion") (brackets in original); *Canada v. Blain's Helicopters, Inc.*, 831 F.2d 920, 925 (9th Cir. 1987) (same); *Safeway Stores, Inc. v. White*, 348 S.W.2d 162, 165 (Tex. 1961) (same); *R.T. Herrin Petroleum Trans. Co. v. Proctor*, 338 S.W.2d 422, 427 (Tex. 1960) (same).

In addition, the District Court improperly rested its conclusions on conjecture regarding the relevant events and the motives of the parties. *See Goldhirsh Group, Inc. v. Alpert*, 107 F.3d 105, 108-09 (2d Cir. 1997) (findings cannot rest on "sheer surmise and conjuncture" and "[t]here must be some affirmative evidence that the event occurred"); *Fineman v. Armstrong World Indus.*, 980 F.2d 171, 191 (3d Cir. 1992); *see Neely v. St. Paul Fire & Marine Ins. Co.*, 584 F.2d 341, 346 (9th Cir. 1978) (finding that the "meager evidence" presented by the plaintiff would not "rationally support" a verdict in his favor because "[i]n order to draw one of the two inferences necessary to a finding of liability against either of the defendants, a jury would inevitably have to rely in large part upon surmise and speculation"); *Wolf v. Reynolds Elec. & Eng'g Co.*, 304

F.2d 646, 649 (9th Cir. 1962) ("The verdict of a jury cannot rest on guess or speculation."); *Marathon v. Pitzner*, 2003 WL 21197255 at *2 (Tex. 2003) ("an inference stacked only on other inferences is not legally sufficient evidence"); *Browning-Ferris, Inc. v. Reyna*, 865 S.W.2d 925, 927 (Tex. 1994) ("suspicion linked to other suspicion produces only more suspicion, which is not the same as some evidence"); *Litton Indus. Prods., Inc. v. Gammage*, 668 S.W.2d 319, 323 (Tex. 1984) (inferences drawn from equivocal circumstantial evidence are inadequate).

The District Court also based its conclusions on what it assumed to be the propensities of the parties to take certain actions. A trier of fact, however, may not presume that a party has a particular propensity based on speculation about the party's motives, character, or other acts, and then infer that, because of this propensity, certain key allegations are therefore established as fact. See Fed. R. Evid. 404(a). For example, as this Court has explained, "[i]t is only where a particular act is shown independently to have been done that thereafter other acts may be proved to show the intent with which it was done." *Smallfield v. Home Ins. Co. of New York*, 244 F.2d 337, 340 (9th Cir. 1957); see *Hynes v. Coughlin*, 79 F.3d 285, 291 (2d Cir. 1996). Because the District Court's methodology was entirely improper, its findings must be set aside.

A. J. Howard Did Not Intend To Give Vickie a Gift Other than the Gifts that He Actually Gave Her During His Lifetime.

As part of her testimony in both the District Court and the Probate Court, Vickie alleged that J. Howard promised to give her half of all of his assets. ER 2762, 2282-83, 5817-27, 3606-07. The Texas jury, however, did

not believe this testimony. ER 3782. Neither did the District Court, concluding that J. Howard never intended to give her such a gift. ER 71, 73-74. Instead, contrary to Vickie's testimony and the testimony of *every other witness,* the District Court determined that J. Howard intended to give Vickie a gift worth tens of millions of dollars based on the appreciation of the value of the Koch stock that MPI owned. ER 74, 78.

There is no evidence establishing the gift that the District Court found to exist. Instead, the District Court based its conclusion regarding J. Howard's donative intent on a series of layered, speculative inferences. The court's inferences, however are insufficient as a matter of law to support its conclusion.

1. The Prenuptial Agreement

The District Court cited the draft prenuptial agreement as evidence of J. Howard's donative intent. ER 31-32, 71. Under the agreement, however, Vickie's entitlement was restricted to $100,000 for each month of marriage, less the value of any gifts that J. Howard gave to her during the marriage. ER 478, 480, 4897-4902. If anything, this document demonstrates that J. Howard wanted to limit Vickie's entitlement, not expand it, and supplies no basis for the conclusion that he intended to give her a gift worth tens of millions of dollars.

2. Lavish Gifts

The District Court referred to the fact that J. Howard gave Vickie lavish gifts as evidence of his donative intent, citing the parallel treatment of Lady Walker. ER 31, 71. It is true that J. Howard gave lavish gifts to both Lady

Walker and Vickie. This observation, however, is not evidence that J. Howard intended to give Vickie a further gift worth tens of millions of dollars.

Indeed, reference to J. Howard's treatment of Lady Walker actually refutes the court's analysis because, as with Vickie, J. Howard clearly intended to provide for Lady Walker only with the gifts that he actually gave her during his lifetime. There is no evidence that J. Howard ever intended to include Lady Walker in his estate plan or give her an interest in his stock holdings, and the same holds true for Vickie.

3. Compagnie Victoire and Marshall Farms Corporation

The District Court cited the creation of Compagnie Victoire and the Marshall Farms corporation as evidence of J. Howard's donative intent. ER 32. Again, however, that fact that J. Howard created these two corporations for Vickie's benefit does not suggest (let alone demonstrate) that he therefore intended to give Vickie any other gift. On the contrary, the fact that J. Howard carried through with these gifts undercuts the District Court's analysis because it demonstrates that J. Howard implemented the gifts that he actually intended Vickie and Lady Walker to receive.

Moreover, J. Howard also set up corporate enterprises for Lady Walker (e.g., Coliseum Oil and Gas). Yet, J. Howard did not thereby intend to giver her a large share of his assets worth tens of millions of dollars. Again, the fact that J. Howard gave Vickie and Lady Walker specific gifts is not evidence of any intent to give either of them anything else.

4. Catch-All Trust Reference in the Townsend Letter

The District Court cited the unadorned reference to a "catch-all trust" in Townsend's letter of December 15, 1992 as evidence of J. Howard's donative intent. ER 32, 71. The only evidence regarding this reference, however, is that no one can explain exactly what it means and that J. Howard never pursued it. ER 5791-97, 5810-16, 5838-43. Under the circumstances, the District Court's conclusion that the reference is evidence of J. Howard's intent to provide Vickie with a gift worth tens of millions of dollars is pure conjecture.

The record demonstrates that J. Howard periodically came up with ideas regarding how to structure his gift-giving. The record also demonstrates that he pursued the ideas that he wanted to pursue, and abandoned those that he did not. The fact that J. Howard never again brought up the "catch-all trust" idea after Townsend's letter suggests only that he never intended to implement it. Further, the amorphous term "catch-all trust" could refer to any number of trust concepts as well as any number of beneficiaries. The concept has no special significance for trust or estate planning purposes. Without more, the mere reference to a "catch-all trust" in a letter from one of J. Howard's lawyers to another is not evidence of any specific intent to create any specific trust or other gift for Vickie.

5. Time Records

The District Court referred to three entries in the billing records of Glynn Blazier, one of Edwin Hunter's partners, as evidence that J. Howard intended to establish

a "catch-all" trust of some kind for Vickie. ER 38. Each of the entries, however, appear on a bill regarding work undertaken in connection with the creation of Compagnie Victoire, the corporation that J. Howard created for Vickie's benefit and that was incorporated on December 30, 1992. ER 578, 564, 5048. Although the billing entries mention the word "trust," they do not elaborate on the concept, and there is no evidence linking the bare reference to the term "trust" in the billing entries to either (a) the "catch-all trust" idea in Townsend's letter, or (b) the creation of a gift for Vickie worth tens of millions of dollars. Indeed, the only evidence is that there is no such link.

Specifically, Hunter testified that neither he nor anyone at his firm drafted a "catch-all trust" for Vickie. ER 4950-52. Glynn Blazier, the author of the billing entries, was not permitted to testify, and thus had no opportunity to explain his records (which would have clarified the matter). During Hunter's testimony, Hunter was asked about Blazier's entries. Hunter stated that they related to the ideas of placing the stock of Compagnie Victoire in trust for Vickie, or the creation of a voting trust for the corporation. ER 4945-49. He specifically denied that they had anything to do with a "catch-all trust." *Id.*

The District Court discredited these explanations. ER 38-39. The court's unwillingness to accept Hunter's testimony, however, does not justify the court's speculative inference that Blazier's mention of the term "trust" in his billing entries must therefore have meant a "catch-all trust" as referenced in Townsend's letter. More important, it did not justify the court's speculative inference that the reference to the term "trust" meant that J. Howard

intended to give Vickie a gift worth tens of millions of dollars. ER 37-39.

6. Deemed Finding

In a footnote, the District Court concluded erroneously and contrary to the evidence that the record establishes the existence of a "draft 'catch-all' trust instrument prepared by Edwin Hunter." ER 32, n.17. In the same footnote, the District Court added that, if it had not reached this conclusion regarding the "catch-all trust" based on the alleged evidence, "the discovery abuses in this case *might* have led the Court to deem this fact as established as a sanction." *Id.* at n.17 (emphasis added). There is, however, no basis for this conclusion.

As explained above, Pierce did not commit discovery abuse in this case. On the contrary, Pierce is the victim of discovery abuse. At great expense, Pierce was forced to respond to duplicative discovery demands on the same claim in three separate proceedings in three different courts: the Probate Court, the Bankruptcy Court, and the District Court. Moreover, in this instance, the District Court clearly abused its authority by turning over all of Pierce's materials, including his privileged documents, to Vickie. In any event, the District Court did not actually find that the evidence warranted a sanction against Pierce, and no sanction is, in fact, warranted.[28]

[28] The District Court stated that it ordered Pierce to produce "several hundred boxes of documents previously withheld" and that Pierce in fact produced over "400 boxes." ER 8. Although it is true that Pierce produced over 400 boxes, it is not true that any of the materials (other than the confidential and privileged files of Pierce's counsel) were

(Continued on following page)

7. Sorensen's GRIT Idea

Sorensen testified that, as part of his exploration of several estate planning ideas for J. Howard, he considered the creation of a GRIT (grantor retained interest trust). ER 504-505, 4906-07. Sorensen also testified, however, that he did not implement this idea, and J. Howard rejected. ER 5798-5803. Nevertheless, the District Court cited Sorensen's idea as evidence of J. Howard's donative intent, commenting that the GRIT "was never produced." ER 38. Logically, the reason why the GRIT was never produced was because it was never anything but an idea. There is no evidence to the contrary, and the court's speculative inference that the idea is evidence of J. Howard's intent is unsupported.

8. The New Community Memo

Sorensen testified that J. Howard asked him to explore the idea of creating a option for Vickie based on the potential increase in dividends on the Koch stock that MPI owned, provided that the option would not trigger tax liability. ER 3181-82, 4878. Sorensen memorialized his discussion with J. Howard in the New Community Memo discussed previously. ER 562. Sorensen testified further that, after he informed J. Howard that the option would generate a tax liability, J. Howard told him to drop the idea. ER 3178-79, 4929, 4930.

The District Court cited the New Community Memo as evidence of J. Howard's intent to give Vickie a large gift worth tens of millions of dollars. ER 34. There is no evidence,

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"previously withheld." Once again, there is no evidence to support the court's commentary.

however, to support this conclusion. On the contrary, once again, the only evidence is that J. Howard did not intend to pursue the idea.

The District Court stated that it believed that J. Howard intended to pursue the gift idea on the theory that J. Howard wanted to provide Vickie with the benefit of his "new community" in the same manner as he had allegedly provided for his deceased wife, Bettye. ER 73. J. Howard, however, never established any such type of "new community" interest for Bettye. ER 177. Sorensen testified that, in reference to Bettye, the concept of "new community" merely distinguished between J. Howard's community property with Bettye, versus his community property with his first wife, Eleanor, which he referred to as "old community." ER 3169-70. Sorensen never testified that J. Howard ever created a special gift or option for Bettye along the lines set forth in the New Community Memo. Accordingly, there is no basis for the court's speculation that J. Howard intended to give Vickie a "new community" gift worth tens of millions of dollars because he had done so for Bettye.[29]

Moreover, the New Community Memo itself sets out a formula specifying the precise contours of J. Howard's option idea. ER 562-63. The formula tied the option to certain criteria, including an increase in the dividends on the Koch stock and prevailing interest rates. ER 562-3, 3171-72. The only evidence is that, if J. Howard had

[29] The District Court also misquoted Sorensen's testimony on the alleged point that the "new community" concept "'was Mr. Marshall's words.'" ER 33. Sorensen, however, never said this, and the court improperly interlineated the quoted language as though it were part of Sorensen's testimony. ER 33, 3170.

implemented his idea, Vickie would have been entitled to little or nothing under the formula. ER 5113-14, 5116. Accordingly, far from demonstrating J. Howard's intent to give Vickie a gift worth tens of millions of dollars, the New Community Memo actually demonstrates the opposite.

9. Interest in Having Children

The District Court cites J. Howard's interest in having a child with Vickie as evidence of his donative intent on the theory that, if J. Howard had conceived a child with her, he would have wanted to support the mother of his child. ER 34. J. Howard, however, did not have any children with Vickie. Accordingly, the predicate for the District Court's assumption did not occur. More important, the court's assumption is not evidence of actual donative intent.

Further, in the only document that addresses this subject directly – the draft prenuptial agreement – J. Howard provided that, in the event he had a child with Vickie, he would place $5 million in trust for her benefit for her lifetime. ER 478. This further undercuts the court's assumption that J. Howard intended to give Vickie an outright gift worth tens of millions of dollars because he thought about having a child.

10. Adoption of Vickie's Son

The District Court cited the idea that J. Howard may have considered the adoption of Vickie's son Daniel as evidence of his donative intent. ER 27. J. Howard, however, never adopted Daniel. ER 2614, 3429-30, 5271. More important, this "idea" is not evidence that J. Howard intended to give Vickie a gift worth tens of millions of

dollars. The record demonstrates that J. Howard intended to provide for Vickie with the more than $6 million in gifts that he gave to her, which he believed would be more than sufficient for her support. *See* 2961-65, 2584, 3088-89, 5265-67, 5271-72.

11. Statement of Support

During the course of the guardianship proceedings, Vickie visited J. Howard with a tape recorder, exposed her breasts, and attempted to have him repeat statements into a microphone that she wanted him to make. ER 3698-3700.[30] One of the statements was "I want my wife to be supported by me." ER 31, 760.The District Court cites this as evidence of J. Howard's donative intent. ER 31. The fact that J. Howard wanted to support his wife, however, is not evidence that he harbored an unfilled intent to give her a gift worth tens of millions of dollars. The record demonstrates that J. Howard intended to support his wife with the gifts that he actually gave to her, and there is no evidence that he thought these gifts were inadequate. ER 2604. In fact, the evidence is that J. Howard believed his gifts to Vickie were sufficient, and that he wanted Pierce to receive the bulk of his assets as set forth in his estate plan. ER 3343-47, 5006, 5108-09, 5265-67, 5271-72.

[30] One of the witnesses testified that, during this encounter, Vickie told J. Howard what to say and then switched on the tape expecting him to repeat what she had just said. When he refused, Vickie would switch off the tape and then scold him for not repeating what she had said. ER 3438-39.

12. Motive

Finally, the court below inferred that J. Howard intended to give Vickie a large gift on the inference that Pierce and others had a motive to prevent her from receiving such a gift because it would mean less for them. ER 47-48. This was clearly improper. Under the court's approach, it would always be possible to prove intent to give a gift simply by showing that the gift was not given and someone else benefited as a result. The court's speculation is no substitute for proof of J. Howard's actual donative intent.

B. Pierce Did Not Interfere with any Alleged Gift to Vickie.

The second critical element of Vickie's alleged cause of action is that Pierce interfered with J. Howard's intent to give her a gift by independently tortious means. In this case, Pierce never interfered with any gift to Vickie, and there is no evidence that Pierce committed any tortious act. In particular, no witness testified that Pierce interfered and there is no other evidence of interference. On the contrary, all the evidence is that he did not interfere in any way with his father's intended gift-giving to Vickie. ER 2303, 2605, 4882-86, 4912-13, 4920-21, 4928, 5045, 5148-49. Once again, the District Court's conclusions are contrary to the evidence and are based exclusively on inappropriate speculation.

1. Pierce's Alleged Knowledge and Motivation

The District Court begins its analysis of Pierce's alleged interference by speculating that Pierce might have had a motive for preventing Vickie from receiving a large

gift. In support of this speculation, the court states that Pierce was present at meetings during the late Fall of 1992 at which J. Howard detailed the gifts that he wanted to give Vickie. ER 33, 47. The evidence, however, is that Pierce never attended any such meeting. ER 4912-13, 4920-21.

For example, the District Court believed that Pierce attended a critical meeting on December 22, 1992 with J. Howard, Hunter, Townsend, and Sorensen to review matters related to Vickie. ER 33. The only evidence, however, is that Sorensen met alone with J. Howard on December 21, 1992 to discuss matters relating to Vickie, and that neither Pierce, Townsend, nor Hunter attended. ER 4928, 4904-05, 4920-21. Although Sorensen met again with J. Howard on December 22, 1992 to execute his Will and an amended and restated living trust instrument, there was no discussion about Vickie with Pierce. ER 4928-29, 4912, 4920-1. The District Court's conclusion that Sorensen met with Pierce and others to discuss matters relating to Vickie is baseless.

The District Court speculated further that Pierce would have been troubled by J. Howard's gift idea set forth in the New Community Memo. ER 47. Apart from the fact that Pierce was completely unaware of this idea, the court's analysis ignores the only evidence on the subject – that J. Howard himself instructed Sorensen to drop the matter because of its tax implications. ER 4927-30, 3172. Moreover, under the option formula set forth in the memo, Vickie would have been entitled to little or nothing. ER 5536-37, 5113-17.

The court speculates that Pierce may have wanted to prevent a gift of any interest in the Koch stock to Vickie

because this might have had an adverse effect on tax litigation with the IRS by establishing an unfavorably high value for the Koch stock. ER 54. The gift formula referenced in the New Community Memo, however, was the same formula appearing in MPI's by-laws that J. Howard used to value the Koch stock that MPI owned. ER 3169-71. Because the formulas were the same, there is no basis for the District Court's speculation that giving Vickie a gift under the terms of the New Community Memo would place a higher value on the Koch stock than would otherwise apply.

2. Alleged Firing of Sorensen

The District Court cited Pierce's alleged firing of Sorensen as evidence of his intent to prevent Vickie from receiving her alleged gift. ER 48. Once again, there is no evidence to support this contention. Pierce testified that he did not fire Sorensen, and Sorensen testified that he was not fired. ER 4934-35, 5761, 5764-66.

In support of its conclusion, the District Court cites exclusively to a letter in the record that Pierce sent to Sorensen. ER 48. This letter, however, merely asks Sorensen to suspend work temporarily on a tax audit that he was performing pending further events and discussions. ER 579. This is hardly evidence that Sorensen was fired, let alone that Pierce intended to thwart a gift to Vickie.[31]

[31] The District Court also determined that "when Pierce suggested to J. Howard that Hunter replace Sorensen, J. Howard consented." ER 48-49. Like the allegation that Pierce fired Sorensen, there is no evidence to support this allegation and it is purely speculative conjecture.

3. 1993 Estate Planning Changes

As detailed previously, in 1993 J. Howard instructed Hunter to make a number of changes to his estate plan. J. Howard wanted to make these changes in order to facilitate his three goals of giving most of his assets to Pierce, maximizing his income to fund his lifestyle, and minimizing the estate taxes that would have to be paid once he passed away. Obviously, a key feature of J. Howard's plan was to give away his assets, which is, after all, one of the basic points of any estate plan.

There is no evidence that any of the 1993 estate planning transactions were either illegal or other than exactly what J. Howard instructed. The District Court conceded that J. Howard's reduction of his interest in MPI to a minority stake was a valid estate planning move. ER 49. Nevertheless, contrary to all of the evidence, the court also concluded that the 1993 changes constituted a plot to "drain" J. Howard of his property. *Id.*

The court based this conjecture on the incorrect premise that "J. Howard . . . had never voluntarily given up control of anything in his life." *Id.* But beginning most notably with his gift of all of his Koch voting stock to his two sons in 1974, J. Howard routinely gave up control of his assets, including making large gifts to Lady Walker, Vickie, various charities, and members of his immediate family.[32]

[32] The District Court speculated in a footnote that J. Howard might have found another way to give up control of MPI without actually giving up control, such as by granting an irrevocable proxy to his former wife Eleanor, which J. Howard could then vote surreptitiously.
(Continued on following page)

The District Court also speculated that J. Howard was "capable of being controlled by Hunter and Pierce because of his physical inability to read." ER 50. Again, the evidence is that J. Howard was able to read. ER 2597, 3647-48. Likewise, there is no evidence that J. Howard was "capable of being controlled."

There is also no evidence to support the court's determination that J. Howard would not have read the 1993 documents because he "wanted legal documents that were a page or two long." ER 49-50. Since 1982, most of the estate planning documents that J Howard executed were more than a page or two long, and it is implausible that, during his long business career, J. Howard only executed documents of extremely short length. The court's commentary is, again, pure conjecture.[33]

4. Fine Tuning Outline and 1994 Estate Plan Changes

Following his wedding to Vickie in 1994, J. Howard again requested that Hunter make changes to his estate plan. ER 3248-50, 5064-65. As explained previously, his goals in doing so were to prevent Vickie from making any subsequent alterations to his plan in the event he became disabled, to prevent Vickie from claiming more from his

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ER 49 n.29. The court's advice, however, would probably constitute a species of tax fraud under section 2036 of the Internal Revenue Code.

[33] In a footnote, the District Court suggested that, although Pierce executed the Pierce Note for $17.5 million in exchange for the 35,466 MPI shares that he bought from his father in 1993, Pierce managed to avoid making any payments on this note. ER 50 n.31. This statement is baseless. Pierce made, and continues to make, all required payments. ER 5353.

estate than what he gave her as gifts, and to confirm his intention to leave most of his assets to Pierce. ER 3250-51, 3265, 4964-66, 3253-56, 2633.

There is no evidence that any of J. Howard's 1994 estate planning transaction were illegal or contrary to his express instructions. Nevertheless, the District Court determined that they were implemented as part of an ongoing plot to strip J. Howard of his property to prevent a gift to Vickie. ER 54-58.

In support of its theory, the court cited Hunter's Fine Tuning Outline that he prepared during the course of implementing J. Howard's 1993 estate planning instructions. ER 54. The court determined that the outline reflected Pierce's efforts to prevent Vickie from receiving a gift. ER 54. The only evidence, however, is that the outline reflects Hunter's notes and comments regarding how to implement J. Howard's wishes. ER 5623. Moreover, the only evidence is that Pierce had nothing to do with the outline and that he was not even aware of its existence. ER 5069-70.

Rejecting this testimony, the District Court determined that Hunter faxed the Fine Tuning Outline to Pierce on July 8, 1994. ER 41. But the evidence is that Hunter did not fax the outline to Pierce. ER 3062-66. Although Hunter sent a fax to Pierce on that day, the evidence is that the fax was not the Fine Tuning Outline. ER 5069-70. During this period, Pierce was asked to supervise Hunter's handling of a tax matter involving Pierce's mother, Eleanor. ER 3228-31. Although Hunter and Pierce discussed this tax matter, they did not discuss J. Howard's estate plan changes. ER 3228-3231.

Disregarding all of the foregoing, the court simply assumed the opposite of the evidence as established truth. This was clear error. Moreover, even if Pierce had been aware of the Fine Tuning Outline (which he was not), there is simply no evidence that any of J. Howard's estate planning instructions were anything other than what J. Howard intended.

5. The Irrevocable Living Trust

The District Court further concluded that J. Howard's decision to make the Living Trust irrevocable was evidence of Pierce's interference. ER 56-57. The only evidence, however, is that it was J. Howard's decision to make the trust irrevocable and that Pierce had nothing to do with it. ER 2266, 2293, 2596, 2633-34, 2669. Once again, the court disregarded the testimony and then improperly assumed the opposite of the testimony to be true.

Contrary to the evidence, the District Court made three mutually inconsistent factual determinations in support of its interference theory: (a) J. Howard was not able to read the Living Trust when he signed it, (b) the Living Trust was forged, and (c) after J. Howard signed the Living Trust, critical pages were substituted. Taken cumulatively, these "findings" make no sense.[34] More

[34] If J. Howard were unable to read, presumably he could have been led to sign anything and there would have been no reason to forge his signature or substitute any pages. If he signed the document, then it was not forged. If it was forged, then he did not sign the document and there would have been no reason to substitute any pages. If pages were substituted after he signed the document, then there would have been no reason for it to be forged. In fact, none of these assertions are true, and all are pure conjecture.

important, the evidence is that J. Howard could read ER 2597, 3647-48; that he signed the Living Trust of his own free act and deed ER 2410, 2633-34; and that no pages were substituted after he signed the document. ER 3137-38. Further, there is no evidence that Pierce had anything to do with any allegedly improper conduct.

On July 12, 1994, J. Howard instructed Hunter to prepare the Living Trust instrument overnight. During the course of editing the document prior to delivering it to J. Howard the next day, individual pages were undoubtedly printed and substituted for pages with errors. No witness testified that anyone substituted any pages *after* J. Howard executed the document. Indeed, the testimony is that there were no such substitutions. ER 3137-38. Further, no witness testified that the document was forged. Again, the court's factual determinations are pure speculation.

In support of its conclusion that the Living Trust was illegitimate, the court relied on the hearsay statements of two purported "expert" witnesses, Fandry and Hale. As explained previously, the court's acceptance of the statements of Fandry and Hale was improper. Moreover, both individuals determined only that certain pages had been substituted, not *when* they were substituted (i.e., before or after J. Howard signed the document). Again, there is no evidence that the pages were substituted after J. Howard executed the trust or, in any event, that Pierce had anything to do with any substitution.

The court also found that Fandry and Hale determined that the Living Trust had been forged. ER 64, 65. This characterization, however, is inaccurate. Neither

made this determination.[35] In contrast, Pierce's expert, Jeanette Hunt, testified that J. Howard's signature was genuine. ER 3002-03, 3004-05. In any event, even if the document was forged (which it was not), there is no evidence that Pierce had anything to do with any alleged forgery.

The District Court further supported its interference theory by determining that J. Howard had been "stripped of his remaining assets and was technically broke." ER 56. In fact, however, the only evidence is that J. Howard had not been stripped of his remaining assets. Although J. Howard made numerous transactions to divest himself of certain assets in his Living Trust for estate planning purposes (e.g., the MPI stock) and to satisfy certain of his debts to MPI, the record demonstrates that he received in exchange income producing assets to fund his lifestyle, such as the $17.5 million Pierce Note. During the same period, J. Howard continued to borrow from MPI to make further gifts to Vickie.

The court also based its interference conclusion on its determination that J. Howard was unaware that the Living Trust was irrevocable. ER 56. Specifically, the court cited the testimony of Glenn Johnson, who stated that, a year after J. Howard executed the Living Trust, he understood that it was irrevocable but believed that "he could change it." *Id.* The court concluded that J. Howard's statement that he could make changes demonstrated that he did not understand that his trust was truly irrevocable. ER 56.

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[35] On the genuineness of J. Howard's signature, Fandry and Hale were both "inconclusive." ER 5706.

In fact, J. Howard's statement was perfectly accurate, and the court confused the concepts of irrevocability with J. Howard's retained power to make certain changes. As explained previously, even though J. Howard had made the trust irrevocable, he retained the power to eliminate Pierce as a beneficiary, to add charities as beneficiaries, and to borrow money against the trust's assets – including to make gifts to Vickie.

Finally, the court cites the recording of the Living Trust in Glasscock County in support of its theory that Pierce interfered. ER 57. The court speculates that Townsend recorded the Living Trust in this county to avoid J. Howard learning of its terms. ER 57. The only evidence, however, is that Townsend recorded the Living Trust in eighteen counties (including the country where J. Howard lived) in order to provide constructive notice of the trust's real estate interests, and there is no evidence to the contrary. ER 3639-40. In addition, there is no evidence that Pierce instructed Townsend where to record the document or in what order.

6. The June 1 Note

As explained previously, as of June 1, 1994, J. Howard had borrowed an additional $5,618,074 from MPI to fund his lifestyle and this debt had to be documented. ER 633. To document his debt, J. Howard executed a note to MPI and pledged his interest in the $17.5 million Pierce Note to secure the note. ER 630. The only evidence is that this was a routine business transaction that J. Howard instructed be done.

Disregarding the testimony, the District Court stated that J. Howard's decision to pledge the Pierce Note to

secure his debt is further evidence of Pierce's interference because, by pledging the note, Pierce could "intercept" the payments and, thus, prevent Vickie from ever receiving them. ER 55. The mere taking of a security interest by MPI, however, did not give Pierce this power. In addition, the amount of the $17.5 million Pierce note was three times the amount of J. Howard's $5.6 million debt, leaving J. Howard a large interest in the note even if the note were used to satisfy his debt. More important, there is no evidence that J. Howard ever intended to give his interest in the Pierce Note to Vickie, and, thus, the court's determination that the note was pledged to avoid a gift to Vickie is, once again, pure conjecture. Nor is there any evidence that Pierce had anything to do with J. Howard's decision to pledge the Pierce Note.

The court also determined that, because J. Howard's note to MPI for $5,618,074 was dated June 1, 1994, it must have been "backdated" because the court believed that it was executed later. ER 55, 56. In fact, the note merely stated J. Howard's *indebtedness* as of a particular date – June 1, 1994. There is no evidence of any backdating, let alone that Pierce participated in it, and the court's determination is again purely speculative.

7. Surveillance of J. Howard

The District Court concluded that the surveillance of J. Howard after his wedding is further evidence of Pierce's interference. ER 50-51. The only testimony, however, was that the surveillance was put in place for J. Howard's protection after J. Howard's staff learned that Vickie's bodyguard had a record of multiple felonies. ER 3426-28, 5318-19. There is no evidence that any of the persons

engaged in the surveillance ever prevented, or attempted to prevent, J. Howard from doing anything, or that anyone instructed them to do so. Accordingly, the court's conclusion is pure speculation and the surveillance is not evidence of any interference with J. Howard's intent to give a gift to Vickie, let alone interference by Pierce.

8. Subsequent Estate Planning Changes

Prior to J. Howard's death, he instructed or approved several final estate planning transactions. The District Court cited these as further evidence of Pierce's interference. ER 57-60. There is no evidence, however, to support the court's conclusions.

The court observed that the trustees of the Living Trust re-sited the trust from Texas to Louisiana. ER 68. There is no evidence that this was done to prevent a gift to Vickie. If J. Howard had wanted to make a gift to Vickie, changing the situs of the trust would have made no difference.

The court stated that, on December 28, 1994, Pierce executed a document renouncing J. Howard's right to all income from the Living Trust. ER 67. Pierce, however, never executed any such document. The Act of Renunciation merely renounced the Living Trust's liability for obligations incurred by J. Howard's *estate* after he died. ER 703, 3067-68. Accordingly, the document is not evidence of any effort to thwart a gift to Vickie by stripping J. Howard of his income. In addition, the only evidence is that Pierce executed the document with J. Howard's consent using his power of attorney. ER 3067-68.

On May 26, 1995, J. Howard sold 63,051 shares of MPI stock to MPI in exchange for a private annuity. ER 768-71, 2636, 3278-3284. The court determined that this was further evidence of interference because "MPI ended up paying nothing for J. Howard's remaining shares." ER 59. There is no evidence to support this conclusion. In fact, MPI did make payments under the terms of the annuity. ER 5353. In addition, the only evidence is that the sale was undertaken at J. Howard's instruction. ER 2636, 5831-32, 5836. Further, there is no evidence that J. Howard ever intended to give any of his shares of MPI stock to Vickie. Even after the transaction, J. Howard's Living Trust still had many valuable assets and he had access to cash. Thus, there is no basis for the conclusion that the sale was intended to thwart a gift to Vickie.[36]

9. Allegedly Tainted Documents

Finally, the District Court concluded that various documents had been "destroyed, backdated, altered, or prepared and presented to J. Howard under false pretenses." ER 61. Once again, there is no evidence to support these conclusions.

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[36] The District Court stated that the private annuity transaction must have been a sham because, at the time J. Howard entered into it, he had "terminal" cancer and, thus, would not live to see any of the payments. Although J. Howard had a cancerous growth, it did not kill him. ER 5339. J. Howard ultimately died of heart failure. The court likewise stated that it did not believe that MPI would have been able to make the annuity payments because it had already exhausted its $15 million line of credit. ER 59-60 n.39. The evidence, however, is that MPI could not use its line of credit to pay for J. Howard's personal expenditures. MPI, however, may well have been able to borrow additional funds for the business purpose of repurchasing its stock.

First, the court cites no example of any document destruction. Second, there is no evidence of any backdating by anyone, let alone Pierce. On January 13, 1994, J. Howard transferred his interest in the GRAT to the Living Trust. ER 3300-01. The court concluded that this document was backdated because a time entry indicated that one of Hunter's associates worked on a donation of an interest in the GRAT on July 12, 1994. ER 62. The GRAT provided a stream of income to the Living Trust. On occasion, J. Howard would assign portions of his various income streams as gifts, and the time entry likely referred to such a transaction. Certainly, the time entry is not evidence of backdating, and the court's conclusion is entirely speculative. Further, as discussed above, there is no evidence of any backdating of the June 1 Note.

Third, there is no evidence that Pierce altered any document. The District Court determined that Hunter changed the terms of the GRAT. ER 43, 61-62. Sorensen questioned the change, and J. Howard executed an affidavit stating that the change was made at his direction. ER 4960-61. Similarly, as discussed above, there is no evidence that Pierce altered the Living Trust.

Fourth, there is no evidence that Pierce prepared or presented any document to J. Howard under false pretenses. The District Court criticized J. Howard's sale of MPI shares in 1995 in exchange for the private annuity. The only evidence, however, is that this was done at J. Howard's instruction and that he understood what he was doing. There is no evidence that anyone (let alone Pierce) misled J. Howard.

C. There Is No Evidence that Vickie Has Suffered any Damages.

The District Court based its conclusion that J. Howard intended to give Vickie a gift primarily on the New Community Memo. As explained above, this memo contained a formula to be used to calculate the option that was tied to increases in the dividends paid on MPI's Koch stock and prevailing interest rates. The only evidence is that, under this formula, Vickie would be entitled to little or nothing because the formula did not generate a significant benefit. ER 5113-17, 5536-37.

Ignoring the formula, the District Court simply created a gift that it felt would be appropriate, and concluded that the appropriate measure of the gift was the alleged estimated increase in the "book" value of MPI's Koch stock during the marriage. ER 78-79. There is no evidence, however, that J. Howard ever intended to give Vickie (or anyone else) a gift based on the book value of the Koch stock. Accordingly, the court's selection of this measure was entirely arbitrary.

Moreover, in conducting its valuation, the court relied on inadmissible evidence. Rejecting all of the expert testimony, the court based its conclusion on hearsay valuations expressed in internal bank presentations at the Texas Commerce Bank. ER 78-79. This was error. The bankers who made the presentations never testified, *were* not qualified as expert witnesses, and were never subject to cross-examination. The view of J. Howard's bankers regarding the "book" value of the Koch stock was classic hearsay and completely inadmissible to establish the "truth" of the value of any Koch shares or their appreciation. Fed. R. Evid. 801 & 802. In addition to being clearly

erroneous, the District Court's consideration of the statements of J. Howard's bankers was also plain error. *See* Fed. R. Evid. 103(d).

* * *

ORAL HEARING IN SAN FRANCISCO

In Re:	:	October 9, 2003
MARSHALL/SMITH 801921-109132	:	

ORAL HEARING

Before: BEEZER, KLEINFELD, PAEZ, CJJ

(Transcription from Tape Recording)

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For Vickie Lynn Marshall:
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* * *

[54] THE COURT: When you use the term "gift," you're including the element of delivery? Did he ever deliver anything to her that he intended to deliver to her?

MR. RICHLAND: He intended to and –

THE COURT: He never did, did he?

MR. RICHLAND: In this respect he didn't – well, what we do not know is, we do not know if there was ever a finalization of the catch-all trust which – because it was missing. Why was it missing? Because it was never

produced. Why wasn't it ever produced? Because Pierce didn't produce it as was found by the bankruptcy court. It was suppressed or destroyed.

Now, certainly she can't be blamed for the fact that the central document in the [35] case doesn't exist –

THE COURT: There are judgments against Pierce individually.

MR. RICHLAND: That's correct.

THE COURT: Did you prove that he tore it up or that he sequestered it?

MR. RICHLAND: The bankruptcy found as a matter of fact that he did. In fact, it was in the control of his lawyer and other documents were produced, including –

THE COURT: That part of the discovery sanctions?

MR. RICHLAND: That was part of the discovery sanctions, yes.

THE COURT: It wasn't proof in the – I can't go to read the testimony, it's something the bankruptcy judge made up, right?

MR. RICHLAND: No, he certainly didn't make it up. He took –

THE COURT: No, I mean he – that's what he put in his order, right? And there's something in the record to support that?

MR. RICHLAND: Absolutely.

THE COURT: I thought all there was in the record to support that is that he was [36] dissatisfied with the son's compliance with discovery and he therefore entered findings of fact against the son on every contested point without evidence.

MR. RICHLAND: Judge Bufford repeatedly over a lengthy period of time required the documents be produced. It was repeatedly –

THE COURT: You're not responding to my question. Was there evidence or was there merely a failure to comply with discovery orders?

MR. RICHLAND: The evidence was the failure to comply with discovery orders notwithstanding the numerous opportunities to –

THE COURT: Did anyone testify he destroyed the documents or I destroyed them at his direction?

MR. RICHLAND: The document was not produced. Perhaps it was suppressed. Perhaps? Who knows.

THE COURT: It's tricky asking you questions.

MR. RICHLAND: I'm sorry, your Honor. I don't know who – if your question is was there evidence –

THE COURT: I'm trying to find out [37] was there testimony that established that the documents were destroyed or was the finding of fact that the documents were destroyed entered as a discovery sanction. I thought it was entered as a discovery sanction and I wanted to make sure that that was right –

MR. RICHLAND: Yes. That is correct.

THE COURT: Now I'm getting all confused.

MR. RICHLAND: I apologize that I didn't catch the distinction you were making. It was entered as a discovery sanction because – because the bankruptcy court found, as a matter of fact, that it either was suppressed or destroyed. It was not produced either in the district court as well, despite the fact that it was about 400 boxes of documents that were produced, somehow this one was missing as well.

THE COURT: As I recall from the record the district court ultimately set aside the discovery sanctions.

MR. RICHLAND: The district court reversed the discovery sanction – excuse me.

THE COURT: No, I was just going to say, so is no such fact even established by the [38] bankruptcy courts unless sanctions –

MR. RICHLAND: It was remanded to the bankruptcy court and the bankruptcy court then did reaffirm the basis for the sanctions.

The problem is that this was of course the central document in the case. This was the document which was to form the basis of the gift, and its absence put a huge gap in things. But you know what, even setting that aside, what we know is that the district court did a de novo review of this case and concluded that in fact this document would have been the embodiment of the gift that was intended to be given.

On that basis it seems to me that there is just – you know, it is in some ways immaterial what the bankruptcy court found or the basis for the bankruptcy court –

THE COURT: When was the gift to be delivered?

MR. RICHLAND: Well, we do not know. What we know is that it was the –

THE COURT: How do we know we have a gift, and if we don't have the three elements supporting a gift we don't have a gift. So why [39] do you keep talking about a gift –

MR. RICHLAND: What we know is –

THE COURT: – if it's not been made in this case?

MR. RICHLAND: It was not a gift. What we know is that there was –

THE COURT: All right. You don't have a gift.

* * *

[63] THE COURT: Thank you, Counsel.

MR. BRUNSTAD: Briefly, your Honor. Howard kept all of his assets in the living trust. There was no other source for the funding of any alleged gift to Vickie. It had to come from somewhere. If it didn't come from there, there was no other place for it to come from.

By validating the living trust, again, the probate court decided who had a legitimate expectancy to J. Howard's assets and who did not, thereby precluding her tort claim.

King vs. Acker is completely distinguishable from this case. In that situation there was a written signed prior will which the probate court considered and determined that that was the valid instrument. Here there's no evidence of a gift, there's no signed document. The only

testimony in the record is that a catch-all trust was never prepared, the only evidence in the record is that the catch-all trust never existed. The reference to a term, "trust," is simply to a word "trust" appearing in a billing record but relates to work performed for Companie Victoire. There's no evidence that the word "trust" in that billing record had [64] anything to do with a supposed catch-all trust or gift to Vickie. The evidence just isn't there.

THE COURT: It had to do with the conduct of Vickie's business though, isn't that right?

MR. BRUNSTAD: It had to do with a corporation that J. Howard created and actually gave to Vickie as he intended. The only evidence in the record is that the word "trust" in the billing record related to a potential voting trust that was thought of to be – to protect Vickie and to control the corporation. There's no evidence that that word, "trust," has anything to do with a catch-all trust.

But apart from all of that there is absolutely no evidence, no testimony, no document, no nothing, that Pierce ever saw a catch-all trust, ever suppressed a catch-all trust, ever tore up a catch-all trust, or did anything of the kind.

* * *

CERTIFICATE

I hereby certify that the foregoing 71 pages are a complete and accurate transcription to the best of my ability of the electronic sound recording of the Oral Hearing in re: Marshall vs. Marshall, 02-56002, 02-56067, 02656603, held in San Francisco, California, on October 9, 2003.

/s/ [John C. Brandon] — 11-10-03

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No. 04-1544

In The Supreme Court of the United States

VICKIE LYNN MARSHALL,

Petitioner,

v.

E. PIERCE MARSHALL,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTIONS PRESENTED

1. What is the scope of the probate exception to federal jurisdiction?

2. Did Congress intend the probate exception to apply where a federal court is not asked to probate a will, administer an estate, or otherwise assume control of property in the custody of a state probate court?

3. Did Congress intend the probate exception to apply to cases arising under the Constitution, laws, or treaties of the United States (28 U.S.C. § 1331), including the Bankruptcy Code (28 U.S.C. § 1334), or is it limited to cases in which jurisdiction is based on diversity of citizenship?

4. Did Congress intend the probate exception to apply to cases arising out of trusts, or is it limited to cases involving wills?

PARTIES TO PROCEEDINGS BELOW

The parties to the proceedings below are Vickie Lynn Marshall and E. Pierce Marshall.

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In re Lucio, 251 B.R. 705 (Bankr. W.D. Tex. 2000) 36

In re Modern Boats, 775 F.2d 619 (5th Cir. 1985) 34

In re White, 851 F.2d 170 (6th Cir. 1988) 34

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In re Ziets, 79 B.R. 222 (Bankr. E.D. Pa. 1987) 38

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Kontrick v. Ryan, 540 U.S. 443 (2004) 28, 29

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Nat'l City Bank v. Coopers & Lybrand, 802 F.2d 990 (8th Cir. 1986) 32

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BOOKS

Theodore F. T. Plucknett, *A Concise History Of The Common Law* (5th ed. 1956) 20

John Norton Pomeroy, *A Treatise on Equity Jurisprudence* (5th ed. 1941) 21

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G.R.Y. Radcliffe & Geoffrey Cross, *The English Legal System* (6th ed. 1977) 20, 21

Alan N. Resnick, et al., *Collier On Bankruptcy*, (15th ed. 2005) 31, 35

J.G. Woerner & William F. Woerner, *American Law of Administration* (3d ed. 1923) 16

Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* (3d ed. 2002) 19

JOURNALS

Thomas E. Atkinson, *Brief History of English Testamentary Jurisdiction*, 8 Mo. L. Rev. 107 (1943) 20, 21

Ralph Brubaker, *Bankruptcy and the Probate Exception to Federal Jurisdiction*, 25 Bankr. Law Letter 1 (March 2005) 22, 47

Peter Nicolas, *Fighting the Probate Mafia: A Dissection of the Probate Exception to Federal Court Jurisdiction*, 74 S.Cal.L.Rev. 1479 (2001) 20, 21, 22

John F. Winkler, *The Probate Jurisdiction Of The Federal Courts*, 14 Prob. L.J. 77 (1997) 20

HOUSE AND SENATE REPORTS

H.R. Rep. No. 95-595 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963 ..... *passim*

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 392 F.3d 1118 (Appendix to Petition For Writ of Certiorari ("App.") 1-38). The opinions of the United States District Court for the Central District of California are reported at 275 B.R. 5 (App. 39-147) and 264 B.R. 609 (App. 148-88). Opinions of the United States Bankruptcy Court for the Central District of California are reported at 257 B.R. 35 (App. 189-200) and 253 B.R. 550 (App. 201-21); an additional opinion of that court is unpublished (Joint Appendix ("JA") 38-44).

JURISDICTION

The Court of Appeal issued its opinion on December 30, 2004. It denied a timely petition for rehearing and rehearing *en banc* on February 16, 2005. App. 222. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1254(1), 1331 and 1334.

STATUTES INVOLVED

The text of 28 U.S.C. §§ 1331, 1332 and 1334 are set out in the Appendix To Petition For Writ of Certiorari, at pages 223-26.[1]

STATEMENT OF THE CASE

A. The Intended *Inter Vivos* Trust.

Petitioner Vickie Lynn Marshall ("Vickie") is the surviving widow of J. Howard Marshall II ("Howard"), who died in August 1995. App. 40. Howard and Vickie met in

[1] 28 U.S.C. § 1334 was amended effective April 20, 2005, but the amendments are not relevant here.

1991; within a week, Howard proposed marriage. App. 67-69. The couple married in June 1994, after a nearly three-year courtship. App. 67-73. Vickie was 26 years old and a well-known model and actress, App. 67, 71-72; Howard was 89 years old and one of the wealthiest men in Texas, with assets exceeding $1.6 billion, App. 40, 149-50, 204-05.

Since 1982, Howard's assets had been held in a trust that named his son, respondent E. Pierce Marshall ("Pierce"), the primary beneficiary upon Howard's death. App. 3. After Howard met Vickie, he instructed his attorneys to create a separate *inter vivos* trust for her benefit, consisting of half the appreciation of his assets from the time of their marriage. App. 78-85, 87-90, 133-36, 204-05, 215-17. Vickie never realized the benefits of that trust, however, because – as both lower courts found – Pierce suppressed or destroyed the trust instrument and stripped Howard of his assets before his death. App. 86-136, 144-46, 202-07, 216-19.

B. The Initial Probate Proceedings.

After Howard's death, Pierce refused to provide Vickie with his will or trust. Excerpts of Record ("ER") 5614. Accordingly, in August 1995, Vickie filed a petition in Texas state court alleging that Howard had died intestate. ER 816.[2] The following week, Pierce initiated a Texas probate proceeding. ER 836-45.[3]

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[2] During Howard's last illness, Pierce had initiated a state court guardianship proceeding; there, Vickie asserted that Pierce was interfering with her right to spousal support and questioned the validity of several transactions in which Pierce was involved. The guardianship proceeding terminated when Howard died. JA 9-21; Supplemental Excerpts of Record ("SER") 12595-96.

[3] Earlier, Pierce had opened a probate in Louisiana, but it was dismissed for lack of jurisdiction in 1998. App. 40-41, 97; ER 843.

Pierce's older brother, who received nothing under Howard's will or trust, opposed the Texas probate application and filed a will contest. SER 5880. Vickie initially did not participate in the probate proceeding, but she ultimately joined the pending will contest in 1998. ER 1319; SER 6757.[4]

C. Vickie's Chapter 11 Bankruptcy; Pierce's Creditor's Claim and Vickie's Counterclaim.

Meanwhile, in January 1996, Vickie filed for bankruptcy in California. App. 41; SER 5987. Pierce filed an adversary complaint and creditor's claim in the bankruptcy proceeding alleging that Vickie, through her lawyers, defamed him by publicly accusing him of forgery, fraud and overreaching to gain control of Howard's assets before his death. App. 151-52, 179-80; SER 6020-26.

Vickie objected to the creditor's claim and answered the adversary complaint, pleading truth as an affirmative defense. App. 42-43, 152; SER 6727-31; DC 98, pp. BK 138, 163. She also asserted a compulsory counterclaim against Pierce for tortious interference with her expectancy of an *inter vivos* gift from Howard. App. 42-43, 152, 197; SER 8702; JA 23-25. This was the first time she asserted that claim in any court. SER 6757, 12260, 12453.[5]

In March 1999, the bankruptcy court confirmed Vickie's reorganization plan, under which creditors would be paid from any proceeds of her counterclaim against

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[4] Vickie filed a spousal support motion in August 1996, but it did not implicate Howard's will or trust and made no personal claims against Pierce. U.S.D.C. Docket ("DC") No. 123, p. AP 255.

[5] The bankruptcy court determined that Vickie's tortious interference counterclaim was a "core" bankruptcy proceeding under 28 U.S.C. § 157(b)(2)(C) since it was a counterclaim that arose out of the same transactions and occurrences as Pierce's creditor's claim. App. 197; JA 38-39.

Pierce, and discharged all prior claims. SER 6065-91, 12453. Subsequently, the court summarily resolved Pierce's defamation claim in Vickie's favor. App. 43, 153; SER 7940-42, 8086-87, 10603.

Shortly before trial of Vickie's tortious interference claim, Pierce asserted, *in limine*, that it was barred by the "probate exception" to federal jurisdiction. App. 195. The court denied the motion as untimely; later, it found on the merits that the probate exception did not apply. App. 192-95; SER 7510-11.

The bankruptcy court tried Vickie's tortious interference claim in late 1999, entering a final judgment for her in December 2000. App. 189-221; JA 38-48. The court found that Howard had instructed his attorneys to create an *inter vivos* trust for Vickie, consisting of half the appreciation of his assets from the time of their marriage, but that Pierce tortiously prevented it. App. 202-07, 213-20.[6] The court also found that Pierce had engaged in "massive discovery abuse," including destroying documents relevant to Vickie's claim. App. 207-13; *see* ER 2235-48. The court awarded Vickie compensatory damages of more than $449 million (the amount of the intended trust), plus punitive damages of $25 million. App. 198-99, 219-21.

D. The Texas Probate Trial.

When the bankruptcy court entered final judgment for Vickie in December 2000, the Texas probate trial was in progress. SER 8426-27, 12453. Vickie immediately dismissed her claims in Texas, including a tortious interference claim she had added in January 2000 after Pierce sought dismissal of her federal suit. ER 2863; SER 8426-27, 10306-09, 12453. She also asked the probate court to

[6] These findings were based, in part, on facts established as sanctions for discovery violations. App. 204 n.5; ER 2235-48.

dismiss Pierce's sole claim against her, which sought sanctions for filing allegedly frivolous pleadings. ER 3446-72; SER 8422-27, 10604-05 n.4.

The probate court denied Vickie's request and refused to give preclusive effect to the bankruptcy judgment, stating that, "I don't think I have an obligation to give [it] full faith and credit." SER 10604-05 n.4; *see also* ER 3472; SER 8473 ("I don't care what the California court did. It has no impact on me."), 8485-86, 8492-94. Instead, it permitted Pierce to amend his action to add new claims against Vickie involving issues that the bankruptcy court had already decided. SER 8609-16, 8638-39, 3994-95, 12260-61, 12453.[7]

Following trial, the Texas jury returned a special verdict for Pierce. The verdict addressed only one question (Question 66) pertaining to Vickie: "Do you find that Vickie . . . did not have *an agreement* with J. Howard . . . that he would give her one-half of all his property?" JA 93 (emphasis added); SER 6624; *see also* SER 12261, 12453.[8]

E. The Texas Probate Judgment.

Pierce obtained a judgment against Vickie in Texas based on Question 66 in December 2001. ER 3782, 4706,

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[7] After the Texas court refused to recognize the bankruptcy judgment, the bankruptcy court enjoined Pierce from proceeding in Texas on claims that violated Vickie's bankruptcy discharge or had already been resolved against him; in response, the Texas court enjoined Vickie from seeking further injunctive relief from the bankruptcy court. ER 3989; SER 6614-96, 8431, 8438, 8461-64, 8497, 8543, 8583, 12262, 12256, 12458, DC 711, pp. AP 27076-86. We do not detail this complicated history here because while it may bear upon a preclusion analysis, it is not relevant to the jurisdictional issue before this Court.

[8] Notably, Vickie had never asserted she had an *agreement* with Howard; her claim was always that Pierce tortiously interfered with an intended *gift*. SER 8584-85, 12261 & n.2, 12453 & n.9.

4736; SER 6623-24, 12261, 12453-54. Explaining the scope of its judgment, the probate court said it "want[ed] to make clear" that it was "deciding all the issues concerning *the Estate*" and "[n]ot anything to do with what complaints [Vickie] has *against [Pierce].*" SER 8663-64 (emphasis added). It further emphasized: "We didn't try any issue of tortious interference with *inter vivos* gift in this case at all." SER 8660. Nonetheless, at Pierce's urging, the judgment included findings on issues not decided by the jury, including that "[Howard] did not intend to give [Vickie] a gift or bequest from [his] Estate . . . either prior to or upon his death." JA 130; SER 8677; *see also* SER 8654-78, 10353-95, 10600-11.

F. The District Court's *De Novo* Review And Judgment Against Pierce.

Pierce appealed the bankruptcy court judgment to the district court in January 2001. App. 148-49; DC 1. In a detailed analysis, the court determined that the probate exception did not apply. App. 158-70. It also concluded, contrary to the bankruptcy court, that although Vickie's claim was a compulsory counterclaim to Pierce's defamation claim, it was not a "core" bankruptcy proceeding under 28 U.S.C. § 157(b)(2)(C). App. 171-87; SER 8702. Thus, it treated the bankruptcy court's judgment as proposed, rather than final, and undertook a "comprehensive, complete and independent review of" the bankruptcy court's determinations. App. 187.

During its *de novo* review, the district court examined all the evidence before the bankruptcy court, plus substantial documentary evidence Pierce previously had refused to produce; it also heard live testimony from key witnesses. App. 40, 45-46; SER 8710-13, 8727-29, 11789. In March 2002, the district court affirmed the bankruptcy court's findings and entered judgment for Vickie. App. 39-40, 130; JA 141-42. It found that Howard directed his

lawyers to prepare an *inter vivos* trust for Vickie consisting of half the appreciation of his assets from the date of their marriage. App. 78-85, 87-90, 133-36, 204-05, 215-17. It also found that, to prevent any substantial gift to Vickie, Pierce conspired to suppress or destroy the trust instrument and to strip Howard of his assets by backdating, altering and falsifying documents, arranging for surveillance of Howard and Vickie, and presenting documents to Howard under false pretenses. App. 86-136, 144-46, 202-07, 216-19.

Based on these findings, the court awarded Vickie compensatory damages of approximately $44.3 million.[9] App. 143-44. Additionally, finding "overwhelming" evidence of Pierce's "willfulness, maliciousness, and fraud," it awarded another $44.3 million in punitive damages. App. 145-46.[10]

G. Pierce's Appeal.

Pierce appealed to the United States Court of Appeals for the Ninth Circuit. Vickie cross-appealed the reduction of her compensatory damages and the district court's

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[9] Like the bankruptcy court, the district court found that Howard intended to give Vickie half the increase of his assets from the date of their marriage. App. 137. However, the district court valued the increase for the period ending on the date of Howard's death, while the bankruptcy court valued it for the period ending on the date of trial. App. 137-38. Accordingly, the district court reduced Vickie's compensatory damages even though it found that "the facts are much more egregious than even the bankruptcy court suspected and found." App. 144.

[10] The district court based its findings on the evidence, not on discovery sanctions. App. 46-47. However, it said that if the evidence were judged insufficient to establish an *inter vivos* trust for Vickie, it might deem the trust established as a sanction for Pierce's pervasive discovery abuses. App. 80 n.17; *see* SER 8703-13.

determination that her compulsory counterclaim was non-core. App. 2; SER 11931-33.

The Ninth Circuit reversed the district court's judgment, holding that under the "probate exception," there was no federal subject matter jurisdiction over Vickie's claim. App. 1-38. In so concluding, the court acknowledged:

> The record before us indicates that the district court has neither decided whether the last will and testament of J. Howard Marshall II should be admitted to probate nor whether the dispositive provisions of decedent's 1982 trust, as amended, are valid. The district court did not supervise the administration of the estate of J. Howard Marshall II. . . . [T]his case does not involve the administration of an estate, the probate of a will, or any other purely probate matter. . . .

App. 28.

However, the court said, the probate exception divests federal courts of subject matter jurisdiction over not only these "pure" probate matters, but also over any claim that (1) "interfere[s] with the probate proceedings" by deciding questions "which would ordinarily be decided by a probate court," or (2) has been exclusively "relegated . . . to a special court" by state law. App. 29, 34. The court said both tests were met here. App. 29-37. It also concluded that although courts commonly refer to "'the probate exception *to diversity jurisdiction*,'" the doctrine applies equally to non-diversity cases, including the present bankruptcy case. App. 25-26. Thus, it held that there was no subject matter jurisdiction over Vickie's claim. *Id.*

Vickie filed a timely petition for rehearing and rehearing *en banc*, which was denied February 16, 2005. App. 222.

SUMMARY OF ARGUMENT

> "On occasion, a would-be doctrinal rule or test finds its way into our case law through simple repetition of a phrase – however fortuitously coined."

Lingle v. Chevron U.S.A. Inc., 125 S. Ct. 2074, 2077 (2005).

The "probate exception" is such a rule. This Court has never recognized a "probate exception" to federal jurisdiction – i.e., a blanket jurisdictional bar that is uniquely applicable to probate-related claims.[11] To the contrary, throughout its history, this Court repeatedly has held that there is broad federal jurisdiction over all kinds of probate-related claims, including claims to decedents' estates by heirs, legatees and creditors. In the occasional case where the Court held that there was no jurisdiction over a particular probate-related claim, it did so because a statutory jurisdictional requisite was not met – for example, because the parties were not diverse or because the plaintiff had not pled a case "at common law or in equity" – *not* because a non-statutory subject-matter exception precluded the exercise of federal jurisdiction.

In the late twentieth century, some of the lower federal courts transmogrified this jurisprudence into a single, amorphous, undifferentiated "probate exception" that potentially excludes federal jurisdiction over any claim that concerns a decedent's will or property. As defined by these courts, this "probate exception" is unmoored from its origins and has no discernible limiting principles. As a result, as the Ninth Circuit's opinion here

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[11] This Court has decided many probate-related claims, but it has never used the term "probate exception." That term appears to have been used for the first time in *Magaziner v. Montemuro*, 468 F.2d 782, 787 (3d Cir. 1972), a domestic relations case; it apparently was first used in a probate-related case in *Lee v. Hunt*, 431 F. Supp. 371, 377 (W.D. La. 1977).

illustrates, it is being used to restrict federal jurisdiction in broad and unprecedented ways.

The Court should reject the "probate exception" as a basis for determining federal jurisdiction. Instead, it should follow a single lodestar: Federal jurisdiction should be exercised as fully as the Constitution permits and Congress intended. Under this principle, this Court must conclude that there is federal subject matter jurisdiction in the present case.

First, this Court has recognized federal jurisdiction over all manner of probate-related claims – so long as the normal requisites of federal jurisdiction are met – even including claims seeking interpretation of a will, determination of a decedent's testamentary intent, and allocation of interests in a decedent's estate. The claim at issue here has no such direct relation to probate. Vickie, a debtor in bankruptcy, is suing to recover tort damages against Pierce personally. Her suit does not seek anything from Howard's probate estate, and it neither implicates his testamentary intent nor challenges the validity of his will or trust. Its outcome, thus, could have no possible effect on probate court proceedings – not on the interpretation of Howard's testamentary documents nor on the administration or distribution of his probate estate. Accordingly, this Court's jurisprudence compels the conclusion that federal jurisdiction over Vickie's claim is not defeated by any "probate exception."

Second, the "probate exception," however understood, can have no application in a bankruptcy case. The bankruptcy jurisdiction statute, 28 U.S.C. § 1334, invests federal courts with exclusive *in rem* jurisdiction over all property of the bankruptcy estate, and with concurrent jurisdiction over all bankruptcy-related claims. The sweeping federal jurisdiction conferred by section 1334 and its legislative history refute any notion that Congress intended state courts to have exclusive jurisdiction over

bankruptcy-related probate matters. There is no place for a "probate exception" in this scheme.

Third, the lower federal courts that have rejected this Court's probate jurisprudence have, in one form or another, adopted two tests for applying a "probate exception" to divest the federal courts of jurisdiction; the Ninth Circuit applied both here. Both tests distort the precedents on which they ostensibly are based, rely on jurisdictional analyses that this Court has repudiated and fly in the face of Congress's clearly expressed intent regarding the scope of federal subject matter jurisdiction.

For all of these reasons, there is federal jurisdiction in the present case. Accordingly, we urge this Court to reverse the Ninth Circuit and reinstate the judgment of the district court.

ARGUMENT

I. THERE IS NO "PROBATE EXCEPTION" TO FEDERAL SUBJECT MATTER JURISDICTION OVER AN *INTER PARTES* TORT ACTION.

A. This Court Consistently Has Recognized Broad Federal Jurisdiction Over Probate-Related Claims.

In decisions dating to the early nineteenth century, this Court consistently has recognized broad federal jurisdiction over claims to a decedent's estate by heirs, legatees and creditors. The Court has explained that if federal jurisdiction is otherwise proper, "'A citizen of another State may establish a debt against the estate. . . . In like manner a distributee, citizen of another State, may establish his right to a share in the estate. . . . '" *Waterman v. Canal-Louisiana Bank & Trust Co.*, 215 U.S. 33, 44 (1909) (quoting *Byers v. McAuley*, 149 U.S. 608, 620 (1893)). Similarly,

> whenever a controversy in a suit between ... parties arises respecting the validity or construction of a will, or the enforcement of a decree admitting it to probate, there is no more reason why the Federal courts should not take jurisdiction of the case than there is that they should not take jurisdiction of any other controversy between the parties.

Gaines v. Fuentes, 92 U.S. 10, 22 (1876).

Thus, in *McClellan v. Carland*, 217 U.S. 268 (1910), the Court held that there was federal jurisdiction to decide whether the plaintiffs were "the sole heirs at law and next of kin of said decedent, and entitled to inherit the estate, real and personal." *Id.* at 275-76. The Court explained that the suit "was within the original jurisdiction of the circuit court of the United States." *Id.* at 281. Moreover,

> The rule is well recognized that the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction, for both the state and Federal courts have certain concurrent jurisdiction over such controversies, and when they arise between citizens of different states the Federal jurisdiction may be invoked, and the cause carried to judgment, notwithstanding a state court may also have taken jurisdiction of the same case.

Id. at 282.

Similarly, in *Waterman*, 215 U.S. 33, the Court held there was federal jurisdiction over a claim that a charitable bequest in a decedent's will lapsed and, thus, the plaintiff was entitled to a portion of the decedent's estate. The Court noted that it had

> uniformly maintained the right of Federal courts of chancery to exercise original jurisdiction (the proper diversity of citizenship existing) in favor

> of creditors, legatees and heirs, to establish their claims and have a proper execution of the trust as to them.

Id. at 43. Thus, since the parties were diverse, a federal court "may, and we think it has the right to, determine, as between the parties before the court, the interest of the complainant in the alleged lapsed legacy and residuary estate." *Id.* at 46.

And, in *Payne v. Hook*, 74 U.S. 425 (1868), the Court held that there was federal jurisdiction over the plaintiff's suit to obtain her intestate share of her brother's estate from the estate administrator, who the plaintiff alleged had used the decedent's assets for private gain. According to the Court, it was "well settled" that a federal court "as an incident to its power to enforce trusts, and make those holding a fiduciary relation account, has jurisdiction to compel executors and administrators to account and distribute the assets in their hands." *Id.* at 431.

These cases are consistent with many others in which the Court has held there is federal jurisdiction over suits to: decide claims arising out of purported wills (*Markham v. Allen*, 326 U.S. 490 (1946); *Byers*, 149 U.S. 608; *Hayes v. Pratt*, 147 U.S. 557 (1893); *Gaines*, 92 U.S. 10); determine intestate succession rights (*Byers*, 149 U.S. 608); resolve claims of breach of duty by estate administrators (*Hook v. Payne*, 81 U.S. (14 Wall.) 252 (1871); *Green's Adm'x v. Creighton*, 64 U.S. (23 How.) 90 (1859); and collect debts against estates (*Lawrence v. Nelson*, 143 U.S. 215 (1892)); *Clark v. Bever*, 139 U.S. 96 (1891); *Borer v. Chapman*, 119 U.S. 587 (1887); *Suydam v. Broadnax*, 39 U.S. (14 Pet.) 67 (1840)).

Vickie's tort claim against Pierce for interference with an intended *inter vivos* gift is well within federal jurisdiction as this Court defined it in these prior cases. Indeed, Vickie's claim is much less closely related to probate; while many of these cases involve claims that relate in some way

to a probate estate or its administration, her claim concerns neither. For example, Vickie's claim:

- Can have no effect on the administration or distribution of Howard's probate estate because it is against Pierce individually, not against Howard's estate. JA 23-25; App. 28, 162-63, 166-67.

- Does not challenge the validity of the will or trust that were before the Texas probate court; instead, Vickie's claim asserts that Howard attempted to create a *separate* trust for her that would have existed independently of, and would not have affected the validity of, the will and trust. App. 28, 162-63, 166-67.[12]

- Did not depend on Howard's death, because it asserted interference with a gift Howard intended to make *during his life*. SER 12448; *see also* SER 11788 ("The issue in this case is not [Howard's] testamentary intent, but his donative intent during his lifetime.").

- Does not depend on Pierce receiving assets from Howard's estate; because it is a tortious *interference* claim, it would have existed even if Howard's wealth had been transferred elsewhere. JA 23-25.

Thus, Vickie's claim is well within federal jurisdiction as recognized by this Court.

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[12] The Ninth Circuit suggested that the district court invalidated Howard's trust, App. 28, 30, 33, but it did not do so. Although the district court considered the circumstances surrounding the trust's execution "as evidence to negate Pierce's contention that . . . Howard had no donative intent," SER 11788 n.2, its judgment expressly did not rest on an assertion that the will or trust were invalid, App. 166-67; SER 11788.

B. This Court Historically Has Recognized Only Narrow Limitations On Federal Probate Jurisdiction, Which Do Not Apply Here.

Although the Court has recognized broad federal jurisdiction over probate-related claims, that jurisdiction is not unlimited. Rather, in the nineteenth and early twentieth centuries, this Court held that federal courts lack jurisdiction over probate-related claims if they fail to meet the same statutory requirements that apply to non-probate claims. It also held that a federal court's remedial power (but not its jurisdiction) is limited by a generally-applicable rule of comity that prevents federal courts from seizing property in the custody of other courts. These jurisdictional and remedial limits were held to divest federal courts of jurisdiction over only a narrow category of probate-related claims, and they do not apply here.

1. Statutory diversity limitations.

Since 1789, there has been statutory diversity jurisdiction over "suits of a civil nature at common law or in equity" (later, "civil actions") between "citizens of different states."[13] In its early jurisprudence, this Court identified narrow limitations on jurisdiction over probate-related matters that result from the requirements of the diversity jurisdiction statute.

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[13] The Judiciary Act of 1789 gave federal courts "original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where . . . the suit is between a citizen of the State where the suit is brought, and a citizen of another State." Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 73, 78. The current version of the diversity statute, 28 U.S.C. § 1332, adopted in 1948, gives the district courts "original jurisdiction of all civil actions where the matter . . . is between . . . citizens of different States."

a. The *inter partes* requirement.

Because diversity jurisdiction depends on diverse citizenship *of parties*, this Court has held that it does not extend to actions "which do[] not necessarily involve any controversy between parties." *Gaines v. Fuentes*, 92 U.S. 10, 21 (1876). This Court has said that the "original probate" of a will (*Ellis v. Davis*, 109 U.S. 485, 497 (1883)) – i.e., the preliminary "establishment" of a will as a testamentary document (*Gaines*, 92 U.S. at 21) – does not involve a dispute between parties and, thus, is outside federal diversity jurisdiction.[14] *Gaines*, 92 U.S. at 21; *In re Broderick's Will*, 88 U.S. (21 Wall.) 503, 509 (1874); *Ellis*, 109 U.S. at 497.

In contrast, the Court has said, disputes between parties that arise out of wills are *inter partes* controversies and, thus, are not barred:

> From its nature, and from the want of parties, or the fact that all the world are parties, the [probate] proceeding is not within the designation of cases at law or in equity between parties of different states, of which the Federal courts have concurrent jurisdiction with the State courts under the Judiciary Act; but whenever a controversy in a suit between such parties arises respecting the validity or construction of a will,

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[14] "A will takes its legal validity from its probate; that is, the certification by the court . . . that it has been executed, published, and attested as required by law. . . ." 2 J. G. Woerner & William F. Woerner, *American Law of Administration* § 214, at 701 (3d ed. 1923). "It is no part of the proceeding on probate to construe or interpret the will or any of its provisions, or to distinguish between valid and void, rational and impossible, dispositions; if the will be properly executed and proved, it must be admitted to probate, although it contain not a single provision capable of execution, or valid under the law. Hence the probate does not establish the validity or effect of any of its provisions; that is to be determined by the courts of construction, when any question arises concerning their interposition." *Id.* § 228, at 774-75.

> or the enforcement of a decree admitting it to probate, there is no more reason why the Federal courts should not take jurisdiction of the case than there is that they should not take jurisdiction of any other controversy between the parties.

Gaines, 92 U.S. at 21-22; *see also Ellis*, 109 U.S. at 497 ("Jurisdiction as to wills, and their probate as such, is neither included in nor excepted out of the grant of judicial power to the courts of the United States. So far as it is *ex parte* and merely administrative, it is not conferred, and it cannot be exercised by them at all until, in a case at law or in equity, its exercise becomes necessary to settle a controversy of which a court of the United States may take cognizance by reason of the citizenship of the parties.").

Thus, while this Court has said that there is no federal jurisdiction to "establish" wills, it has routinely adjudicated disputes *between parties* arising out of purported wills. *See, e.g., Waterman v. Canal-Louisiana Bank & Trust Co.*, 215 U.S. 33 (1909) (action to determine rights under will); *Byers v. McAuley*, 149 U.S. 608 (1893) (action to invalidate will); *Hayes v. Pratt*, 147 U.S. 557 (1893) (action to determine rights under will); *Gaines*, 92 U.S. 10 (action to annul a will as evidence of title to real property). It has also adjudicated all manner of other *inter partes* claims involving decedents' estates. *See* § I.A, *supra*.

The *inter partes* requirement discussed in these cases does not oust jurisdiction in the present case. Here, the lower federal courts were not asked to probate Howard's will or, indeed, to adjudicate any controversy arising out of it. App. 28, 162-63, 166-67. Rather, they were asked only to decide Vickie's claim that she is entitled to damages *from Pierce* for tortiously interfering with a gift Howard intended to make during his life. App. 28, 162-63, 166-67; SER 11788, 12448. Moreover, and of dispositive significance here, the *inter partes* limitation is a creature of the

diversity statute and has no application to federal bankruptcy jurisdiction, which does not depend on an *inter partes* dispute. *See* § II, *infra*.

b. The diverse party requirement.

Because federal diversity jurisdiction extends only to disputes between citizens of different states, this Court has held that it "can go no further than . . . diverse citizenship extends." *Byers*, 149 U.S. at 618. Accordingly, the Court has said that in diversity cases, federal courts may not administer entire probate estates unless there is complete diversity among all interested parties. *E.g.*, *Byers*, 149 U.S. at 620 ("Federal court erred in . . . attempting to adjudicate the rights of citizens *of the State, as between themselves.*") (emphasis added); *Waterman*, 215 U.S. at 45 (lacking complete diversity, "the bill in this case goes too far in asking to have an accounting of the estate"); *Hook v. Payne*, 81 U.S. (14 Wall.) 252, 255 (1871) ("all that part of the decree which attempts to settle the rights of [non-diverse] parties . . . must be reversed").

Although the diverse party requirement thus precludes wholesale estate administration absent complete diversity among all claimants, it does not bar federal adjudication of disputes between citizens of different states over rights to decedents' estates. *E.g.*, *Byers*, 149 U.S. at 620 (federal court "might entertain jurisdiction in favor of all citizens of other States, to determine and award their shares in the estate"); *Waterman*, 215 U.S. at 46 (federal court "has the right to determine, as between the parties before the court the interest of the complainant in the alleged lapsed legacy and residuary estate"); *Hook*, 81 U.S. at 256 (federal court may exercise jurisdiction over claims to decedent's estate made by diverse parties).

The diverse party requirement does not oust jurisdiction over Vickie's claim, which seeks adjudication of a tort claim *against Pierce individually*, not administration of

Howard's estate. JA 23-25; App. 28, 162-63, 166-67. Moreover, the diverse party requirement should have no application to a claim in bankruptcy, which depends neither on a dispute between parties nor on diversity of citizenship.

c. The common law or equity requirement.

This Court has held that the pre-1948 grant of diversity jurisdiction over suits "at common law or in equity" limited federal equity jurisdiction to that exercised by "the High Court of Chancery in England at the time of the adoption of the Judiciary Act of 1789." *Waterman*, 215 U.S. at 43; *see also McClellan v. Carland*, 217 U.S. 268, 281 (1910) (same).[15] Thus, because in English practice wills of personal property were probated in ecclesiastical courts, not the High Court of Chancery, this Court held that federal equity courts also lacked jurisdiction to establish or annul wills. *In re Broderick's Will*, 88 U.S. at 512 ("the court of chancery will not entertain jurisdiction of questions in relation to the probate or validity of a will which the ecclesiastical court is competent to adjudicate"); *Armstrong v. Lear*, 25 U.S. (12 Wheat.) 169, 175 (1827) ("By the common law, the exclusive right to entertain jurisdiction over wills of personal estate, belongs to the ecclesiastical Courts"); *Gaines*, 92 U.S. at 21 ("by the general jurisdiction of courts of equity . . . a bill will not lie to set aside a will or its probate").

The limitation imposed by exclusive English ecclesiastical jurisdiction was very narrow. By the late eighteenth century, the English ecclesiastical courts had exclusive

[15] Prior to 1938, the federal courts operated as separate courts of law and equity. 4 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* §§ 1004, 1041 (3d ed. 2002). Legatees, heirs and creditors generally sued in the federal equity courts, which offered them broader relief than was available in the law courts.

jurisdiction only over proceedings to establish (i.e., "probate") wills of personal property and to appoint and remove personal representatives. John F. Winkler, *The Probate Jurisdiction Of The Federal Courts*, 14 Prob. L.J. 77, 86-87 (1997); *see also* G.R.Y. Radcliffe & Geoffrey Cross, *The English Legal System* 239 (6th ed. 1977). The common law courts, in contrast, had exclusive jurisdiction over testamentary and intestate transfers of real property, as well as over debt actions against decedents' estates. Winkler, *supra*, at 82, 86; Peter Nicolas, *Fighting the Probate Mafia: A Dissection of the Probate Exception to Federal Court Jurisdiction*, 74 S. Cal. L. Rev. 1479, 1503-04 (2001); Thomas E. Atkinson, *Brief History of English Testamentary Jurisdiction*, 8 Mo. L. Rev. 107, 113 (1943). The High Court of Chancery had even broader probate jurisdiction; it

> regularly granted a wide variety of relief in [probate-related] proceedings. It gave creditors, heirs, and legatees any relief needed to establish their interests against one another or their decedents' personal representatives. It determined heirs, construed wills, and took whatever actions were needed to distribute a decedent's personal property to the proper parties. It ordered full accountings and disclosures by personal representatives, appointed masters to supervise their estate administration, and assessed personal damages against them for misconduct.

Winkler, *supra*, at 87.

By the eighteenth century, the High Court of Chancery "had become the usual forum for resolving disputes arising during the administration and distribution of decedent's personal property." *Id.*[16] Additionally, "[w]here

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[16] *See also* Theodore F. T. Plucknett, *A Concise History Of The Common Law* 742 (5th ed. 1956) ("Particularly in the sixteenth and

(Continued on following page)

the claim against an estate was purely equitable, as where a testator . . . had devised property in trust . . . the court of chancery had, of course, an original and exclusive jurisdiction." Pomeroy, *supra*, § 156, at 211-12; *see also Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1993) (emphasis added) (citing *Lessee of Smith v. McCann*, 65 U.S. (24 How.) 398, 407 (1861)) (throughout eighteenth century, chancery exercised "*exclusive* jurisdiction over virtually all actions by beneficiaries for breach of trust.") Thus, "chancery would . . . never refuse to adjudicate matters relating to trusts." Nicolas, *supra*, at 1513-14.

Chancery's jurisdiction was unaffected by a parallel proceeding in a church court: "By 1787, at least, it was established that the pendency of suit in the church court was not ground for dismissal of a bill in equity for administration of the same estate." Atkinson, *supra*, at 119; *see also Bissel v. Axtell*, 2 Vern. 47, 23 Eng. Rep. 641 (1688) (ordering administrator to account although he had already done so in the ecclesiastical court); *Howell v. Waldron*, 2 Chan. Cas. 85, 22 Eng. Rep. 858 (1681) (suit by infant legatee allowed to proceed although also pending in church court); *Anon.*, 1 Atk. 491, 26 Eng. Rep. 311 (1738) (chancery court enjoined ecclesiastical suit so claim for legacy could be decided in chancery court).

Consistent with this history, while federal equity courts did not probate wills, they routinely decided claims arising out of wills, *see* § I.A, *supra*, including claims to

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seventeenth centuries, the inadequacy for all practical purposes of the ecclesiastical courts drove litigants into chancery"); 1 John Norton Pomeroy, *A Treatise on Equity Jurisprudence* § 346, at 776 (5th ed. 1941) ("the equitable jurisdiction of administrations, though often called concurrent, practically became exclusive"); Radcliffe & Cross, *supra*, at 139 ("interference of the Court of Chancery in the administration of the estates of deceased persons led naturally to another very important branch of the jurisdiction of the court, namely the construction of the wills of personal property").

recover property distributed under wills, *e.g.*, *Gaines*, 92 U.S. at 17, 20 (equity court could "annul the will as a muniment of title"). Additionally, as in England, they routinely exercised jurisdiction over trusts. *E.g.*, *Waterman v. Canal-Louisiana Bank & Trust Co.*, 215 U.S. 33, 43 (1909) (noting power of federal equity courts "to exercise original jurisdiction . . . in favor of creditors, legatees and heirs to . . . have a proper execution of the trust as to them"); *Borer v. Chapman*, 119 U.S. 587, 600 (1887) ("It is upon the ground of such a trust that the jurisdiction of courts of equity primarily rests").

Assuming the jurisdiction the ecclesiastical courts once had could somehow continue to limit federal jurisdiction today,[17] that would not preclude jurisdiction over Vickie's claim. Her tort claim for damages against Pierce for interference with a gift would not have been within the exclusive jurisdiction of the ecclesiastical courts at any time. Rather, as a claim seeking a money judgment against Pierce for interfering with a trust, JA 23-25; App.

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[17] The restrictions on federal jurisdiction that resulted from exclusive English ecclesiastical jurisdiction arguably should have no continuing influence. *See*, *e.g.*, *Lloyd v. Loeffler*, 694 F.2d 489, 492 (7th Cir. 1982) ("[I]t would be odd if the jurisdiction of England's ecclesiastical courts, theocratic institutions unlikely to be well regarded in America, should have been thought to define the limits of the jurisdiction of the new federal courts."); *Ashton v. Josephine Bay Paul and C. Michael Paul Found., Inc.*, 918 F.2d 1065, 1071 (2d Cir. 1990) ("Ecclesiastical courts are not part of the American legal tradition, and the drafters of the Judiciary Act may well have viewed chancery's deference to such courts as nothing but a quirk of English legal history."); Nicolas, *supra*, at 1502 ("[I]t is unlikely that the drafters of the 1789 Act would have thought of federal jurisdiction as divided among common law, equity, and ecclesiastical law. Indeed, it is likely that they thought the latter category was subsumed by the former two."); Ralph Brubaker, *Bankruptcy and the Probate Exception to Federal Jurisdiction*, 25 Bankr. Law Letter 1, 5 (March 2005) (characterizing as "extremely curious" any continuing impact of exclusive ecclesiastical jurisdiction).

28, 162-63, 166-67, it would have been within the jurisdiction of the English courts of law or equity.

2. The "*Williams* doctrine."

This Court has applied an additional non-statutory limitation on the power of federal courts to adjudicate probate-related claims: the "*custodia legis*" or "*in gremio legis*" doctrine. In *Williams v. Benedict*, 49 U.S. (8 How.) 107, 112 (1850), this Court held that where a state court has prior possession of a decedent's estate, the estate's assets are "*in gremio legis*" ("under the protection of the law") and, thus, not subject to direct process by a federal court. This doctrine is explicitly remedial, not jurisdictional, however: While it precludes federal courts from "seiz[ing] or control[ling] property . . . in the custody of a court of the state," *Borer v. Chapman*, 119 U.S. 587, 600 (1887), it "*has no application* . . . wherein the plaintiff seeks merely an adjudication of his right . . . as a basis of a claim against a fund in the possession of a state court," *Princess Lida v. Thompson*, 305 U.S. 456, 466 (1939) (emphasis added). Thus,

> A citizen of another State may establish a debt against the estate. But the debt thus established must take its place and share of the estate as administered by the probate court; and it cannot be enforced by process directly against the property of the decedent. In like manner a distributee, citizen of another State, may establish his right to a share in the estate, and enforce such adjudication against the administrator personally, or his sureties, or against any other parties subject to liability, or in any other way which does not disturb the possession of the property by the state court.

Waterman, 215 U.S. at 44 (citations & internal quotation marks omitted).

The *Williams* doctrine is irrelevant to Vickie's claim, which does not ask the federal courts to "seize" or "control" any property in the custody of a state court. JA 23-25; App. 28, 162-63, 166-67. Rather, Vickie's claim seeks damages against Pierce individually, *id.* – something that the *Williams* doctrine expressly allows. Moreover, and also dispositive here, the *Williams* doctrine does not apply to federal bankruptcy jurisdiction; as explained below, one of the express purposes of the Bankruptcy Code is to give the federal courts exclusive jurisdiction over bankruptcy estate assets, even if the assets are in the custody of another court. *See* note 25, *infra*.

C. The Court's Modern Decisions Demonstrate That There Is Federal Jurisdiction Over This Case.

1. *Markham v. Allen.*

This Court applied the principles articulated in its nineteenth and early twentieth century probate-related decisions most recently in *Markham v. Allen*, 326 U.S. 490 (1946), a federal suit arising out of the death of a California resident who willed property to German citizens. While a state court probate action initiated by the decedent's heirs was pending, the Alien Property Custodian, a federal officer, sued in federal court claiming he, not the heirs, was entitled to the decedent's estate. *Id.*

This Court held there was federal jurisdiction over the Custodian's suit and awarded him the decedent's entire net estate. The Court explained that although a federal court may not "probate a will or administer an estate," it has jurisdiction over "suits 'in favor of creditors, legatees and heirs' and other claimants against a decedent's estate" so long as it does not "disturb or affect the possession of property in the custody of a state court." *Id.* at 494. There, the Court found no such effect: Although the federal judgment awarded the Custodian the decedent's *entire net*

estate, it left "undisturbed the orderly administration of decedent's estate in the state probate court and . . . decree[d] petitioner's right in the property to be distributed after its administration." *Id.* at 495. "This, as our authorities demonstrate, is not an exercise of probate jurisdiction or an interference with property in the possession or custody of a state court." *Id.*

Markham's holding, which recognized broad federal jurisdiction over probate-related suits, is entirely consistent with its predecessors. It demonstrates that there is federal jurisdiction over Vickie's claim, which does not seek to probate a will, administer an estate or disturb the possession of any property in probate court custody. JA 23-25; App. 28, 162-63, 166-67. Indeed, far from awarding Howard's "entire net estate" to Vickie – an outcome that under *Markham* would be well within federal jurisdiction – the federal judgment had *no* effect on Howard's estate. *Id.*

2. The domestic relations exception: *Ankenbrandt v. Richards*.

Since *Markham*, this Court has had no further occasion to discuss the breadth of federal jurisdiction over probate-related matters. However, in *Ankenbrandt v. Richards*, 504 U.S. 689 (1992), it ruled that a cognate doctrine, the "domestic relations exception," bars federal jurisdiction over divorce, alimony, or child custody decrees, but allows federal courts to entertain tort actions between diverse parties, even if they arise out of domestic disputes.

Ankenbrandt was a tort action for damages alleging abuse of two children by their father. *Id.* at 691. The district court dismissed for lack of jurisdiction, concluding that "'the whole subject of the domestic relations . . .

belongs to the laws of the States.'" *Id.* at 691-92. This Court reversed, holding federal jurisdiction was proper.[18]

Ankenbrandt compels a similar holding here. *First*, in *Ankenbrandt*, this Court made clear that, whatever its legitimacy or scope, a domestic relations exception to federal jurisdiction does not encompass a tort claim between diverse parties seeking damages. *Ankenbrandt*, 504 U.S. at 704. Here, Vickie's tort claim against Pierce is exactly that: A tort claim for damages that does not involve the probate, administration or distribution of Howard's estate in any way. JA 23-25; App. 28, 162-63, 167.

Second, if an *Ankenbrandt*-type analysis were applied here, it would operate so as to preclude any extension of the limits that this Court has imposed on federal jurisdiction over probate-related matters. In enforcing a domestic relations exception, *Ankenbrandt* considered itself bound by the Court's prior cases recognizing that exception – not because of the reasoning of those precedents, but because Congress had effectively codified those cases:

> We thus are content to rest our conclusion that a domestic relations exception exists as a matter of statutory construction not on the accuracy of the historical justifications on which it was seemingly based, but rather on Congress' apparent acceptance of this construction of the diversity jurisdiction provisions in the years prior to 1948, when the statute limited jurisdiction to "suits of a civil nature at common law or in equity." [¶] When Congress amended the diversity statute in

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[18] The Court held that Article III of the Constitution "contains no limitation on subjects of a domestic relations nature." *Id.* at 695. It traced the "domestic relations exception" to early decisions of the Court, which held that there was no federal jurisdiction over divorce or alimony because English equity jurisdiction, on which federal equity jurisdiction was based under the prevailing diversity jurisdiction statute, did not extend to those subjects. *Id.* at 698-99.

> 1948 to replace the law/equity distinction with the phrase "all civil actions," we presume Congress did so with full cognizance of the Court's nearly century-long interpretation of the prior statutes, which had construed the statutory diversity jurisdiction to contain an exception for certain domestic relations matters.

Id. at 700.

Ankenbrandt's approach, if applied here, freezes this Court's prior holdings on jurisdiction over probate-related matters.[19] *Ankenbrandt* thus would exclude from federal jurisdiction only the narrowest band of cases. As we have shown, this Court has held that in some circumstances federal courts cannot probate wills, administer estates or seize property in the custody of other courts, but it has never recognized any other limitations on federal probate jurisdiction. To the contrary, it repeatedly has exercised broad jurisdiction over probate-related claims. *See* §§ I.A-I.C.1, *supra*. As applied to probate-related cases, therefore, *Ankenbrandt* demonstrates that any "probate exception" cannot bar federal jurisdiction over an *inter partes* tort action like the present one, which does not seek to probate a will, to administer a decedent's estate or to interfere with any property in the custody of another court. JA 23-25; App. 162-63, 166-67.

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[19] *Ankenbrandt's* approach is somewhat different than the approaches of the Court's earlier probate-related cases: While those cases recognized only limitations that could be traced to specific statutory provisions or to the *Williams* doctrine, *Ankenbrandt* held that additional limitations could be engrafted onto the statutes through Congressional silence. Under *Ankenbrandt's* approach, however, those additional limitations can be no broader than those this Court identified in prior cases.

D. This Court Should Reject The Concept Of A "Probate Exception" And Reaffirm Broad Federal Jurisdiction Over Probate-Related Claims.

In the sixty years since *Markham v. Allen*, many of the lower federal courts have hewn closely to its analysis, holding that there is broad federal jurisdiction over probate-related claims. Petition for Certiorari ("Pet. Cert.") 12-14. Others, however, while purporting to follow *Markham*, have lost sight of the origins of this Court's discrete limits on federal jurisdiction over probate-related claims and – as we discuss more fully in Section III, *infra* – merged them into a single, amorphous "probate exception" that divests federal courts of jurisdiction over any suit that potentially concerns a decedent's will or property in any way. *Id.* at 14-18.[20] Thus, these lower courts have posited a wide-ranging, non-statutory bar to claims based solely on their subject matter.

This Court should reject entirely the concept of a "probate exception." As this Court has held, "*Only Congress* may determine a lower federal court's subject-matter jurisdiction." *Kontrick v. Ryan*, 540 U.S. 443, 452 (2004)

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[20] Many of these courts apparently believed that the probate exception is a judicially-created doctrine that, accordingly, cannot be defined with reference to statute. *E.g.*, *Lepard v. NBD Bank*, 384 F.3d 232, 237 (6th Cir. 2004) (" 'Under the so-called "probate exception," even when the requirements of diversity jurisdiction have been met . . . a federal court nonetheless lacks jurisdiction over cases involving probate matters.' "); *Storm v. Storm*, 328 F.3d 941, 944 (7th Cir. 2003) (discussing "practical bases" for applying "judicially created" probate exception); *Sianis v. Jensen*, 294 F.3d 994, 997 (8th Cir. 2002) ("The probate exception is a judicially-created limitation on federal court subject matter jurisdiction, which prohibits the exercise of jurisdiction even where . . . all the prerequisites for diversity jurisdiction are otherwise present."); *Bedo v. McGuire*, 767 F.2d 305, 307 (6th Cir. 1985) ("The boundaries of the judicially created probate exception to federal diversity jurisdiction are quite imprecise.").

(citing U.S. Const., Art. III, § 1) (emphasis added). Thus, this Court should reaffirm its long-standing jurisprudence in which federal jurisdiction over probate-related claims – as over all claims – is defined by the jurisdictional statutes Congress enacted. As in the present case, therefore, where a dispute arises between parties and federal jurisdiction is otherwise proper, "there is no more reason why the Federal courts should not take jurisdiction of [a probate-related] case than there is that they should not take jurisdiction of any other controversy between the parties." *Gaines v. Fuentes*, 92 U.S. 10, 21-22 (1876).

II. THERE IS NO "PROBATE EXCEPTION" TO FEDERAL BANKRUPTCY JURISDICTION.

The preceding section demonstrates that this Court's prior cases provide no basis for declining jurisdiction over Vickie's *inter partes* tort claim against Pierce. But there is another, independent reason why federal jurisdiction exists here: A "probate exception," however understood, can have no application to a case like this one that properly invokes federal bankruptcy jurisdiction.

Because only Congress can define a lower federal court's subject matter jurisdiction, *Kontrick v. Ryan*, 540 U.S. at 452, a "probate exception" can apply in bankruptcy only if Congress so intended. In determining whether federal subject matter jurisdiction exists, thus, this Court's "task is to construe what Congress has enacted." *Duncan v. Walker*, 533 U.S. 167, 172 (2001); *accord Ankenbrandt*, 504 U.S. at 698.

The Ninth Circuit in the present case never analyzed the bankruptcy jurisdiction statute, 28 U.S.C. § 1334 ("section 1334"). *See* App. 25-26. As we now demonstrate, the plain language and legislative history of section 1334 show that Congress unqualifiedly did not intend a "probate exception" to federal bankruptcy jurisdiction. Rather, section 1334's plain language and legislative history show

that Congress intended to confer broad federal jurisdiction over *all* bankruptcy-related claims and to address any state comity concerns through non-jurisdictional, statutory abstention provisions.

A. The Plain Language And Legislative History Of 28 U.S.C. § 1334 Demonstrate That Congress Invested The Federal Courts With Jurisdiction Over All Bankruptcy Claims And Intended No "Probate Exception" To That Comprehensive Jurisdictional Grant.

Section 1334 invests the federal courts with exclusive jurisdiction over all cases "under" the Bankruptcy Code (Title 11 of the United States Code), and nonexclusive jurisdiction of all civil proceedings "arising under" the Bankruptcy Code or "arising in or related to" cases under the Bankruptcy Code. 28 U.S.C. § 1334(a)-(b). It also invests federal courts with exclusive jurisdiction over "all the property, wherever located, of the debtor as of the commencement of [a bankruptcy] case, and of property of the estate." 28 U.S.C. § 1334(e). Such property includes "all legal or equitable interests of the debtor in property as of the commencement of the case," 11 U.S.C. § 541(a)(1), including the debtor's claims against third parties, *Celotex Corp. v. Edwards*, 514 U.S. 300, 307 n.5 (1995); H.R. Rep. No. 95-595, at 367 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6323; S. Rep. No. 95-989, at 82 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5868.[21]

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[21] There is no dispute that Vickie's claim against Pierce falls within section 1334's express terms. Her claim was a mandatory counterclaim to the proof of claim and complaint to determine dischargeability of debt that Pierce filed in the bankruptcy case, App. 197-98; JA 39; SER 8702; it was her primary asset for satisfaction of creditor claims, SER 6075, 6086; and, at a minimum, it "related to" the bankruptcy because it was a "cause of action owned by the debtor which became property of the estate pursuant to 11 U.S.C. § 541," *Celotex*, 514 U.S. at 307 n.5.

Section 1334's plain language thus shows that Congress intended to provide federal courts with complete jurisdiction over all bankruptcy-related claims. This plain language – which is facially inconsistent with a probate exception – must be "'give[n] effect according to its terms'" unless an implied exception is necessary "to prevent 'absurd results' or consequences obviously at variance with the policy of the enactment as a whole." *United States v. Rutherford*, 442 U.S. 544, 551 (1979). Here, far from being necessary to prevent absurd results, an implied probate exception would directly *contravene* Congress's intent to invest federal courts with broad jurisdiction to determine all bankruptcy-related claims.

Section 1334 was part of a Congressional overhaul of the bankruptcy law in 1978 and 1984 that significantly expanded federal bankruptcy jurisdiction.[22] It was "a distinct departure from" the limited bankruptcy jurisdiction conferred under prior bankruptcy acts. *Celotex*, 514 U.S. at 308; *accord United States v. Whiting Pools*, 462 U.S. 198, 206 n.13 (1983). Those jurisdictional limits had spawned costly jurisdictional disputes and forced parties to splinter bankruptcy-related claims among multiple state and federal forums. *See* H.R. Rep. No. 95-595, at 43-52, *as reprinted in* 1978 U.S.C.C.A.N. at 6004-13; 1 Alan N. Resnick, et al., *Collier On Bankruptcy*, ¶ 1.06, at 1-60–1-68

[22] Section 1334 derived from section 1471 of the Bankruptcy Reform Act of 1978 ("1978 Act"). In *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982), this Court held that the 1978 Act was unconstitutional because it gave Article III-type powers to bankruptcy judges who lacked life tenure. In response, Congress enacted the Federal Judgeship Act of 1984 ("1984 Amendments"), which maintained the 1978 Act's comprehensive grant of federal bankruptcy jurisdiction, but allocated that jurisdiction between district courts and bankruptcy courts in a constitutionally permissible way. *See* 28 U.S.C. §§ 157, 1334.

(15th ed. 2005).[23] Congress enacted section 1334 to curtail these jurisdictional disputes by substantially enlarging the bankruptcy jurisdiction of federal courts so that "[a]ctions that formerly had to be tried in State court . . . at great cost and delay to the estate, may now be tried in the bankruptcy courts." H.R. Rep. No. 95-595, at 445-46, *as reprinted in* 1978 U.S.C.C.A.N. at 6400-01; *accord* S. Rep. No. 95-989, at 153, *as reprinted in* 1978 U.S.C.C.A.N. at 5939.[24]

To accomplish its goal, Congress provided "broad and complete [federal bankruptcy] jurisdiction over all matters and proceedings that arise in connection with bankruptcy cases," including "proceedings to which the debtor is a party if the outcome of the proceedings will have an

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[23] The legislative history of the 1978 Act is authoritative with regard to section 1334 because although the 1984 Amendment redistributed federal bankruptcy power between the bankruptcy and district courts, it did not change the scope of federal bankruptcy jurisdiction. *Wood v. Wood (In re Wood)*, 825 F.2d 90, 92-93 (5th Cir. 1987) ("it seems plain that Congress intended no change in the scope of jurisdiction set forth in the 1978 Act when it later enacted section 1334 of the 1984 Act"; thus, "legislative history and judicial interpretations of th[e] [1978] Act . . . are instructive" in interpreting section 1334); *Nat'l City Bank v. Coopers & Lybrand*, 802 F.2d 990, 993 (8th Cir. 1986) (same); *Celotex*, 514 U.S. at 308 (plurality opinion discussing 1978 Act's legislative history when discussing congressional intent for section 1334(b)).

[24] *See, e.g.*, S. Rep. No. 95-989, at 17 ("[a] major impetus underlying this reform legislation has been the need to enlarge the jurisdiction of the bankruptcy court in order to eliminate the serious delays, expense and duplications associated with the current [law]") *as reprinted in* 1978 U.S.C.C.A.N. at 5803; H.R. Rep. No. 95-595, at 46 ("[a] comprehensive grant of jurisdiction . . . would greatly diminish the basis for litigation of jurisdictional issues which consumes so much time, money, and energy of the bankruptcy system"), *as reprinted in* 1978 U.S.C.C.A.N. at 6007; H.R. Rep. No. 95-595, at 49 (1978 Act intended to eliminate litigation over jurisdiction that has "plagued the bankruptcy system"), *as reprinted in* 1978 U.S.C.C.A.N. at 6010; H.R. Rep. No. 95-595, at 43 ("the delay attendant upon litigation over jurisdiction is needless and expensive"), *as reprinted in* 1978 U.S.C.C.A.N. at 6004.

impact on the case." H.R. Rep. No. 95-595, at 48-49, *as reprinted in* 1978 U.S.C.C.A.N. at 6010; *accord* H.R. Rep. No. 95-595, at 47-48 (Congress intended to "confer jurisdiction over all litigation having a significant connection with bankruptcy"), *as reprinted in* 1978 U.S.C.C.A.N. at 6009. In other words, Congress conferred "the *broadest* grant of jurisdiction to dispose of proceedings that arise in bankruptcy cases or under the bankruptcy code," including both "*in personam* jurisdiction as well as *in rem* jurisdiction to handle everything that arises. . . ." H.R. Rep. No. 95-595, at 445 (emphasis added), *as reprinted in* 1978 U.S.C.C.A.N. at 6400. Congress believed that "the combination of the three bases for jurisdiction, 'arising under title 11,' 'arising under a case under title 11,' and 'related to a case under title 11,' will leave no doubt as to the scope of the bankruptcy court's jurisdiction over disputes." *Id.* at 445-46, *as reprinted in* 1978 U.S.C.C.A.N. at 6401; *accord* S. Rep. No. 95-989, at 154, *as reprinted in* 1978 U.S.C.C.A.N. at 5940.

In short, as this Court has recognized, section 1334's plain language and legislative history demonstrate that Congress gave the federal courts "'comprehensive jurisdiction . . . so that they might deal efficiently and expeditiously with *all matters* connected with the bankruptcy estate.'" *Celotex*, 514 U.S. at 308 (emphasis added). Section 1334(b) therefore "authorizes a district court to exercise concurrent jurisdiction over certain bankruptcy-related civil proceedings that would otherwise be subject to the exclusive jurisdiction of another court." *Bd. of Governors v. McCorp Fin.*, 502 U.S. 32, 41 (1991). And, section 1334(e) invests the district court with exclusive *in rem* jurisdiction over the property of the bankruptcy estate. *Tenn. Student Assistance Corp. v. Hood*, 541 U.S.

440, 448 (2004); *In re White*, 851 F.2d 170, 172-74 (6th Cir. 1988).[25]

Section 1334's plain language and legislative history, thus, refute any notion that Congress intended, through an implied "probate exception," to give state courts exclusive jurisdiction over probate-related claims that impact bankruptcy cases.

B. The Legislative History Of The Bankruptcy Code Shows That Congress Intended Federal Courts To Have Jurisdiction Over Assets Common To Bankruptcy And Probate Estates.

As demonstrated above, a "probate exception" to section 1334 is inconsistent with Congress's clearly-expressed intent to invest federal courts with sweeping jurisdiction over bankruptcy-related claims. In itself, that

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[25] The exclusive *in rem* jurisdiction conferred by section 1334(e) makes the *Williams* doctrine, *see* § I.B.2, *supra*, inapplicable to bankruptcy cases. As the Sixth Circuit has explained: "[T]he 1978 and 1984 changes to the Bankruptcy Code were primarily aimed at getting away from the kind of *in rem* jurisdiction set out in [cases applying the *Williams* doctrine]. The jurisdiction granted [in now section 1334(e)] indicates a conscious effort by Congress to grant the bankruptcy court special jurisdiction and to preclude the type of jurisdictional disputes evidenced in those cases." *In re White*, 851 F.2d at 172-73. Federal courts therefore have exclusive *in rem* jurisdiction over property of the bankruptcy estate even where state courts previously acquired *in rem* jurisdiction over that property in pre-petition proceedings. *See, e.g., id.* at 173 (bankruptcy court had *in rem* jurisdiction over marital property even though state divorce court was "first court to exercise control over the property"); *In re Modern Boats*, 775 F.2d 619, 620 (5th Cir. 1985) (admiralty court's "previous acquisition of *in rem* jurisdiction . . . did not defeat the bankruptcy court's jurisdiction"); *In re French*, 139 B.R. 476, 482 (Bankr. D.S.D. 1992) ("[t]he amendments to the Bankruptcy Code . . . , coupled with the legislative history, clearly indicate that the bankruptcy court had jurisdiction over such matters as a pending divorce even when the state divorce court had in rem jurisdiction first").

fact precludes a "probate exception" to federal bankruptcy jurisdiction. But the legislative history is even more conclusive, as it shows Congress specifically rejected the notion that a probate court should have exclusive jurisdiction over property common to a bankruptcy estate and a probate estate.

The legislative history demonstrates that when Congress enacted the 1978 Act, it expressly contemplated that a debtor's death would give rise to a probate estate that might compete for bankruptcy estate assets. In that circumstance, the *bankruptcy court*, not the probate court, would have jurisdiction over any potentially common assets and claims to those assets:

> Once the [bankruptcy] estate is created, no interests in property of the estate remain in the debtor. Consequently, if the debtor dies during the case, only property exempted from property of the estate or acquired by the debtor after the commencement of the case and not included as property of the estate will be available to the representative of the debtor's probate estate. The bankruptcy proceeding will continue in rem with respect to the property of the [es]tate, and the discharge will apply in personam to relieve the debtor, and thus his probate representative, of liability for dischargeable debts.

H.R. Rep. No. 95-595, at 368, *as reprinted in* 1978 U.S.C.C.A.N. at 6324; S. Rep. No. 95-989, at 83, *as reprinted in* 1978 U.S.C.C.A.N. at 5869.[26]

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[26] Bankruptcy Rule 1016 "carries out this congressional intent. . . ." 9 Alan N. Resnick, et al., *Collier On Bankruptcy* ¶ 1016.02 (15th ed. 2005). It provides that: (a) in cases under chapter 7, a debtor's death "shall not abate" the bankruptcy proceeding and "the estate shall be administered and the case concluded in the same manner, so far as possible, as though the death . . . had not occurred"; and (b) in cases under chapters 11, 12 or 13, if upon a debtor's death "further administration is possible and in the

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Congress expressed a similar understanding elsewhere in the legislative history, where it clarified that a debtor could be discharged from his debts *even after his death*: "[I]f the debtor dies during the bankruptcy case, he will nevertheless be released from his debts, and his estate will not be liable for them. Creditors will be entitled to only one satisfaction – from the bankruptcy estate and not from the probate estate." H.R. Rep. No. 95-595, at 384, *as reprinted in* 1978 U.S.C.C.A.N. at 6340; S. Rep. No. 95-989, at 98, *as reprinted in* 1978 U.S.C.C.A.N. at 5884.

Congress could not have reached these conclusions if it had intended state courts to have exclusive jurisdiction over issues and assets common to bankruptcy and probate proceedings. Rather, the legislative history shows that Congress anticipated competing claims for property in federal bankruptcy and state probate proceedings, and intended that in those circumstances federal jurisdiction would be paramount. That intent is irreconcilable with a "probate exception" to bankruptcy jurisdiction.

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best interest of the parties, the case may proceed and be concluded in the same manner, so far as possible, as though the d th or incompetency had not occurred." Fed. R. Bankr. P. 1016. Through Rule 1016, thus, even after a debtor's death, the federal courts retain exclusive jurisdiction over the property of the bankruptcy estate and any claims regarding that property. *E.g.*, *In re Lucio*, 251 B.R. 705, 710 (Bankr. W.D. Tex. 2000) (upon a bankruptcy debtor's death, "[t]he probate estate has no authority to supervene the bankruptcy trustee's exclusive control over property of the bankruptcy estate. . . . Neither can the probate estate entertain collateral attacks on the claims allowance process."); *Querner v. Querner* (*In re Querner*), 7 F.3d 1199, 1201 (5th Cir. 1993) (bankruptcy court "had discretion under Bankruptcy Rule 1016 to continue the Chapter 13 case after the death of the debtor, and it had exclusive jurisdiction over the debtor's property during the pendency of those proceedings"). A probate exception to bankruptcy jurisdiction would effectively abrogate this rule.

C. Section 1334's Abstention Provisions Are Further Evidence That Congress Did Not Intend A "Probate Exception" To Federal Bankruptcy Jurisdiction.

The conclusion that Congress did not intend a "probate exception" to federal bankruptcy jurisdiction is reinforced by the abstention provisions of section 1334(c). They demonstrate that instead of restricting the broad bankruptcy jurisdiction conferred by sections 1334(a), (b) and (e), Congress chose to address federal-state comity concerns through non-jurisdictional statutory abstention provisions.

Under section 1334(c)(1), a federal court *may* abstain from deciding any claim "arising under title 11 or arising in or related to a case under title 11" if "in the interest of justice" or "in the interest of comity with State courts or respect for State law." 28 U.S.C. § 1334(c)(1). Under section 1334(c)(2), upon a timely motion, a federal court *shall* abstain from hearing a claim "related to a case under title 11" if there is no separate basis for federal jurisdiction and the claim is "based upon a State law claim or State law cause of action" and "can be timely adjudicated . . . in a State forum of appropriate jurisdiction." 28 U.S.C. § 1334(c)(2).

The plain language of section 1334(c)'s abstention provisions "demonstrate the intent of Congress that concerns of comity and judicial convenience should be met, not by rigid limitations on the jurisdiction of federal courts, but by the discretionary exercise of abstention when appropriate in a particular case." *Wood*, 825 F.2d at 93. "'Congress wisely chose a broad jurisdictional grant and a broad abstention doctrine over a narrower jurisdictional grant so that the district court could determine in each individual case whether hearing it would promote or impair efficient and fair adjudication of bankruptcy

cases.'" *Luker v. Reeves* (*In re Reeves*), 65 F.3d 670, 675 (8th Cir. 2005).

Through the plain language of section 1334, Congress provided federal courts with a mechanism to avoid deciding state law issues that might be more appropriately litigated in state courts. That mechanism is not a jurisdictional exception, but rather carefully drawn provisions that give federal courts jurisdiction over bankruptcy-related state law issues – including issues related to probate and domestic relations[27] – but permit them to abstain from exercising their jurisdiction where appropriate.[28]

In sum, there is no legitimate basis to imply a "probate exception" into section 1334. Far from being "essential to prevent 'absurd results' or consequences obviously

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[27] *See, e.g., Salisbury v. Ameritrust Tex., N.A.* (*In re Bishop College*), 151 B.R. 394, 395 & fn. 1 (Bankr. N.D. Tex. 1993) (bankruptcy court exercised discretion to interpret will and determine whether assets of charitable trusts were debtor's property); *Carter v. Lummis* (*In re Tom Carter Enters.*), 44 B.R. 605, 610 (C.D. Cal. 1984) (district court denied abstention motion based on Nevada probate proceedings); *Weinberg v. Boyle* (*In re Weinberg*), 153 B.R. 286, 294-95 (Bankr. D.S.D. 1993) (court exercised discretion to resolve domestic relations issue related to bankruptcy case); *In re Becker*, 136 B.R. 113, 119-20 (Bankr. D.N.J. 1992) (same); *In re Ziets*, 79 B.R. 222, 226-27 (Bankr. E.D. Pa. 1987) (same); *compare In re French*, 139 B.R. at 482-83 (bankruptcy court recognized it had jurisdiction under section 1334 to determine divorce issues, but exercised discretion to abstain and remand matter to state divorce court).

[28] Abstention under section 1334(c) is not an issue in the present case. The bankruptcy court found that there was an insufficient basis for abstention under section 1334(c)(1) and that Pierce's motion under section 1334(c)(2) was untimely. App. 196. The district court affirmed those rulings and also independently elected to hear Vickie's claim. SER 8593-99. The section 1334(c)(1) rulings were not appealable, 28 U.S.C. § 1334(d); the section 1334(c)(2) rulings were appealable, but Pierce abandoned the issue by failing to raise it in the Ninth Circuit. *TRW Inc. v. Andrews*, 534 U.S. 19, 34 (2001); *Indep. Towers of Wash. v. Washington*, 350 F.3d 925, 929-30 (9th Cir. 2003).

at variance with the policy of [section 1334]," *United States v. Rutherford*, 442 U.S. 544, 552 (1979), an implied probate exception would directly undermine Congress's intent to confer federal bankruptcy jurisdiction over all bankruptcy-related claims.

III. THIS COURT SHOULD REJECT THE "PROBATE EXCEPTION" POSITED BY THE NINTH CIRCUIT AND OTHER LOWER FEDERAL COURTS.

As we have demonstrated, there is no statutory justification for a "probate exception" that divests federal courts of subject matter jurisdiction over probate-related claims, particularly those that arise in a bankruptcy action. For that reason alone, the "probate exception" posited by the Ninth Circuit and other courts should be rejected. *See* §§ I, II, *supra*. There is another reason for rejecting the Ninth Circuit's analysis, however: As we now show, the specific tests it adopted distort the precedents on which they ostensibly are based and rely on approaches to jurisdiction that this Court explicitly has rejected.

A. The Interference Test.

1. The interference test is fundamentally inconsistent with *Markham*, on which it ostensibly is based.

In concluding that the probate exception ousts federal jurisdiction over Vickie's claim, the Ninth Circuit embraced a two-part test. The first prong adopted the analysis of the First and Third Circuits, as well as one panel of the Second Circuit, under which a federal court lacks jurisdiction to "interfere with the probate proceedings." App. 28; *see also* App. 31, 33. A court "interfere[s]" when it decides issues that "would ordinarily be decided by a

probate court" or makes findings "in direct and irreconcilable conflict with" a probate court judgment, thus giving a claimant "a second chance to litigate her claim against the estate." App. 28, 30, 32-33.[29]

The ostensible root of the "interference" analysis is *Markham v. Allen*, in which the Court held that federal courts may "entertain suits 'in favor of creditors, legatees and heirs' and other claimants against a decedent's estate" so long as they do not "*interfere with* the probate proceedings." *Markham v. Allen*, 326 U.S. 490, 494 (1946) (emphasis added). The "interference" *Markham* cautioned against, however, manifestly was *not* federal adjudication of rights to a decedent's estate. *Id.* at 494-95. To the contrary, *Markham* held that a federal court "*may* exercise its jurisdiction to adjudicate rights in [estate] property," even if a state probate action is pending and a federal judgment will bind a state court. *Id.* (emphasis added). Thus, while the "interference" analysis adopts *Markham*'s language, it turns the case on its head.

2. The interference test conflates preclusion and jurisdiction.

In addition to being fundamentally inconsistent with *Markham*, the "interference" test makes a fundamental analytic error – conflating *res judicata* and jurisdiction – that this Court recently disapproved in *Exxon Mobil Corp.*

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[29] *Accord Mangieri v. Mangieri*, 226 F.3d 1, 2-3 (1st Cir. 2000) (claim is barred by the probate exception if it is "within the jurisdiction of the [probate court]" or "would require the district court to set aside the ruling of the probate court"); *Moser v. Pollin*, 294 F.3d 335, 340-43 (2d Cir. 2002) (claim held barred by the probate exception because it interferes with probate by "predetermin[ing] the result to be reached by" the probate court); *Golden v. Golden*, 382 F.3d 348, 358 (3d Cir. 2004) ("permitting an action that seeks . . . to assail or contradict a judgment of the probate court generally constitutes impermissible interference with the probate").

v. Saudi Basic Indus. Corp., 125 S. Ct. 1517 (2005). There, the lower court had held that under the *Rooker-Feldman* doctrine, there was no federal jurisdiction over the petitioner's claims because they "'have already been litigated in state court.'" *Id.* at 1525. This Court reversed, holding that properly invoked concurrent jurisdiction does not "vanish[] if a state court reaches judgment on the same or related question while the case remains *sub judice* in a federal court." *Id.* at 1527. The Court explained:

> Disposition of the federal action, once the state-court adjudication is complete, would be governed by preclusion law. . . . *Preclusion, of course, is not a jurisdictional matter.* In parallel litigation, a federal court may be bound to recognize the claim- and issue-preclusive effects of a state-court judgment, but federal jurisdiction over an action does not terminate automatically on the entry of judgment in the state court.

Id. (emphasis added) (citations omitted).

The Court emphasized that the federal statutory scheme permits concurrent state and federal adjudication of claims and, thus, "'the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction.'" *Id.* at 1526-27 (quoting *McClellan v. Carland*, 217 U.S. 268, 282 (1910)). Rather, "If a federal plaintiff 'present[s] some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party . . . , then there is jurisdiction and state law determines whether the defendant prevails under principles of preclusion.'" *Id.* at 1527.

Applying these principles here leads unalterably to the conclusion that the probate court's adjudication of Vickie's claim could not deprive the federal courts of jurisdiction because a pending state court action "'is no bar to proceedings concerning the same matter in the Federal court.'" *Id.* at 1526-27. Entry of judgment in Texas

is also irrelevant to federal jurisdiction; while such a judgment may be preclusive, federal jurisdiction nonetheless exists because "[p]reclusion . . . is not a jurisdictional matter." *Id.* at 1527.[30]

B. The State Law Test.

1. The state law test violates this Court's repeated holding that federal probate jurisdiction does not depend on state law.

The second prong of the Ninth Circuit's probate exception analysis is the test of the Fourth, Sixth, Eighth

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[30] A central vice of misidentifying "preclusion" as "jurisdiction" is that it permits a court, as the Ninth Circuit did here, to avoid the requisite preclusion analysis. App. 37 ("[W]e need not address E. Pierce Marshall's arguments concerning claim and issue preclusion."). Texas issue preclusion law bars relitigation only of issues that were "actually litigated," "essential to the prior judgment" and "identical to an issue in a pending action." *Texas Dep't of Public Safety v. Petta*, 44 S.W.3d 575, 579 (Tex. 2001); *see also Price v. Texas Employers' Ins. Ass'n*, 782 S.W.2d 938, 940 (Tex. App. 1989) (to collaterally estop, "identical" issue must have been "actually litigated," "finally . . . determined on the merits" and "necessary, essential and material to the outcome of the prior action"). Texas claim preclusion law bars relitigation only of claims that were "finally adjudicated" or were "compulsory" counterclaims in a prior proceeding. *Ingersoll-Rand Co. v. Valero Energy Corp.*, 997 S.W.2d 203, 206-07 (Tex. 1999). A counterclaim is not compulsory if it is "the subject of a pending action" at the time of pleading. *Id.* at 207. The Ninth Circuit never considered whether these factors were met; thus, it ignored facts critically relevant to a preclusion analysis, such as: the bankruptcy court judgment preceded the probate court judgment by nearly a year, App. 17, 19; JA 45, 106; Vickie's claim against Pierce was never litigated to final judgment in the probate court, ER 2863; SER 8426-27, 12453; the only question the Texas jury considered concerning Vickie was whether Howard contracted to give her half his property – which both lower federal courts found irrelevant to Vickie's tortious interference claim, JA 93; SER 6624, 12261, 12453; and Vickie's claim against Pierce was not a compulsory counterclaim in Texas because it was pending in the bankruptcy court years before she joined the Texas will contest, JA 23-25; ER 1319; SER 6757, 12260, 12453; *see also* SER 10600-11.

and Tenth Circuits. Those circuits have held that there is no federal jurisdiction over any suit that, under state law, is within the exclusive jurisdiction of state probate courts. In these circuits:

> The standard for determining whether federal jurisdiction may be exercised is whether under state law the dispute would be cognizable only by the probate court. If so, the parties will be relegated to that court. . . .

Rienhardt v. Kelly, 164 F.3d 1296, 1300 (10th Cir. 1999) (emphasis omitted) (citing *McKibben v. Chubb*, 840 F.2d 1525, 1529 (10th Cir. 1988)).[31]

The Ninth Circuit adopted this "state law" approach in the present case:

> Where a state has relegated jurisdiction over probate matters to a special court and if that state's trial courts of general jurisdiction do not have jurisdiction to hear probate matters, then the federal courts also lack jurisdiction over probate matters.

App. 34.

The Ninth Circuit held, moreover, that there are virtually no limits to the matters over which a state may deprive federal courts of jurisdiction:

> The probate jurisdiction extends to all probate matters whether based on a theory of tax liability, debt, gift, bequest, tort, or any other theory that interferes with the probate of wills or the

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[31] *Accord Turja v. Turja*, 118 F.3d 1006, 1009 (4th Cir. 1997); *Lepard v. NBD Bank*, 384 F.3d 232, 237-38 (6th Cir. 2004); *Bedo v. McGuire*, 767 F.2d 305, 305-07 (6th Cir. 1985); *Sianis v. Jensen*, 294 F.3d 994, 998 (8th Cir. 2002); *Beren v. Ropfogel*, 24 F.3d 1226, 1228 (10th Cir. 1994).

> state court's ability to engage in the administration of estates.

Id.

This approach – under which state probate laws dictate the scope of federal jurisdiction – has been repeatedly rejected by this Court. This Court has said:

> We have repeatedly held "that the jurisdiction of the courts of the United States over controversies between citizens of different States, cannot be impaired by the laws of the States, which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power."

Payne v. Hook, 74 U.S. 425, 430 (1868). Similarly:

> [I]nasmuch as the jurisdiction of the courts of the United States is derived from the Federal Constitution and statutes, that in so far as controversies between citizens of different States arise which are within the established equity jurisdiction of the Federal courts ... the jurisdiction may be exercised, *and is not subject to limitations or restraint by state legislation establishing courts of probate and giving them jurisdiction over similar matters.*

Waterman v. Canal-Louisiana Bank & Trust Co., 215 U.S. 33, 43 (1909).[32]

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[32] *Accord McClellan v. Carland*, 217 U.S. 268, 281 (1910) (constitutional and statutory grants of federal jurisdiction cannot "be impaired by subsequent state legislation creating courts of probate"); *Hayes v. Pratt*, 147 U.S. 557, 570 (1893) (state probate statutes cannot "defeat or impair the general equity jurisdiction of the Circuit Court of the United States to administer, as between citizens of different states, the assets of a deceased person within its jurisdiction"); *Lawrence v. Nelson*, 143 U.S. 215, 223-24 (1892) (same); *Clark v. Bever*, 139 U.S. 96, 102 (1891) (states cannot preclude federal jurisdiction by assigning exclusive jurisdiction over probate-related claims to its courts, because "no such

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This Court's precedents, thus, hold that because federal jurisdiction is created by federal statute, it cannot be impaired by state law. These precedents are fundamentally inconsistent with the approach of the Ninth Circuit and other federal courts of appeals, which makes the scope of federal jurisdiction entirely dependent on state legislative choices concerning the internal organization of state courts.

2. The state law test is fundamentally inconsistent with the precedents on which it ostensibly is based.

The "state law" test apparently originates in two decisions of this Court, *Sutton v. English*, 246 U.S. 199 (1918) ("*Sutton*") and *O'Callaghan v. O'Brien*, 199 U.S. 89 (1905) ("*O'Callaghan*").[33] *Sutton* and *O'Callaghan* were disputes between heirs and legatees in which the latter sought to annul wills already admitted to probate in state courts. Both cases held that federal courts have jurisdiction over "questions relating to the interests of heirs, devisees, or legatees," but they ordinarily cannot "set aside a will or the probate thereof" because "matters of this character are not within the ordinary equity jurisdiction of the federal courts." *Sutton*, 246 U.S. at 205; *see also*

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result can be constitutionally effected."); *Borer v. Chapman*, 119 U.S. 587, 600 (1887) (federal jurisdiction "cannot be affected by any legislation except that of the United States"); *Hess v. Reynolds*, 113 U.S. 73, 77 (1885) ("[The] jurisdiction of the courts of the United States . . . cannot be ousted or annulled by statutes of the States, assuming to confer it exclusively on their own courts."); *Barrow v. Hunton*, 99 U.S. 80, 85 (1879) (same); *Green's Adm'x v. Creighton*, 64 U.S. (23 How.) 90, 107-08 (1859) (same).

[33] *E.g.*, *Bedo*, 767 F.2d at 307; *Erwin v. Barrow*, 217 F.2d 522, 524 (10th Cir. 1954); *Ferguson v. Patterson*, 191 F.2d 584, 586 (10th Cir. 1951).

O'Callaghan, 199 U.S. at 110 ("as . . . the requirement of probate is but a regulation to make a will effective, matters of pure probate . . . are not within the jurisdiction of the courts of the United States"). Nonetheless, in both cases this Court said that states can *expand* federal jurisdiction to include claims to set aside wills or probate by permitting state equity or law courts to hear those claims. *Sutton*, 246 U.S. at 205 ("where a State . . . gives to parties interested the right to bring an action or suit *inter partes*, either at law or in equity, to annul a will or set aside the probate, the courts of the United States . . . can enforce the same remedy"); *O'Callaghan*, 199 U.S. at 110 (same); *see also In re Broderick's Will*, 88 U.S. (21 Wall.) 503, 520 (1874) ("an enlargement of equitable rights may be administered by the Circuit Courts, as well as by the courts of the State").

Sutton and *O'Callaghan*, thus, expressly permit states to *expand* federal jurisdiction, but not to *shrink* it. Interpreting *Sutton* and *O'Callaghan* as the Ninth Circuit and other courts have done – to allow state law to expand *or contract* federal jurisdiction – is thus simply wrong. It also creates profoundly troubling results. Under the Supremacy Clause, "if there is any conflict between federal and state law, federal law shall prevail." *Gonzales v. Raich*, 125 S. Ct. 2195, 2212 (2005); *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 108 (1992) ("[U]nder the Supremacy Clause . . . '"any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield."'"). The state law test reaches precisely the opposite conclusion: It holds that in the event of a conflict between federal jurisdictional statues and state probate laws, the *federal* laws yield.

The affront to federal jurisdiction engendered by the state law test in an ordinary case was magnified here because the Ninth Circuit held that the district court could

not independently determine its own jurisdiction, but instead was bound by the probate court's determination that *it* had exclusive jurisdiction over Vickie's claim. The Ninth Circuit stated: "The probate court ruled it had exclusive jurisdiction over all of Vickie Lynn Marshall's claims against E. Pierce Marshall. *That ruling was binding on the United States district court.*" App. 35 (emphasis added).

Under the Ninth Circuit's analysis, where state and federal jurisdiction is concurrent, federal courts can be deprived of a key prerogative – the power to "*independently* determine" their own jurisdiction. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 178 (1988) (emphasis added). But that clearly is not the law. *E.g.*, *Chesapeake & Ohio Ry. Co. v. McCabe*, 213 U.S. 207, 217 (1909) (federal court has the right to determine whether a case may be removed to federal court "independently of the jurisdiction and determination of the state courts"). As this Court has held:

> [E]ven if the Circuit Court had no jurisdiction to entertain [petitioner's claim], and if this Court had no jurisdiction of the appeal, this court, and this court alone, could decide that such was the law. *It and it alone necessarily had jurisdiction to decide whether the case was properly before it.*

United States v. Shipp, 203 U.S. 563, 573 (1906) (emphasis added).[34]

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[34] *See also United States v. Ruiz*, 536 U.S. 622, 628 (2002) ("a federal court always has jurisdiction to determine its own jurisdiction"); Ralph Brubaker, *Bankruptcy and the Probate Exception to Federal Jurisdiction*, 25 Bankr. Law Letter 1, 10 (March 2005) ("If the scope of the federal district court's jurisdiction . . . was, in fact, dependent upon the extent of exclusive probate jurisdiction in the Texas courts, it seems that the district court would be duty-bound to determine for itself the full extent of the Texas probate court's exclusive jurisdiction").

Because federal courts always have jurisdiction to determine their own jurisdiction, another court's jurisdictional analysis can never deprive them of that right. The Ninth Circuit held directly to the contrary.

The Ninth Circuit's analysis also leads to a direct conflict with *Exxon Mobil* which, as discussed above, held that federal jurisdiction is unaffected by the entry of a state court judgment. *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 125 S. Ct. 1517, 1527 (2005) ("federal jurisdiction over an action does not terminate automatically on the entry of judgment in the state court"). The Ninth Circuit's conclusion is directly contrary; by concluding that a state court's jurisdictional analysis controls the exercise of federal jurisdiction, it assumes that federal jurisdiction can evaporate – even, as here, years into a case – if a state court concludes *its* jurisdiction is exclusive.

Finally, even if a state court's judgment could somehow preclude a federal court's independent determination of its jurisdiction, that could happen only if state preclusion principles so dictated. Here, they do not. As we have shown, Texas law requires that a finding must have been "actually litigated" and "essential to the prior judgment" to have issue-preclusive effect. *See* note 30, *supra*. The Texas probate court's ruling that its jurisdiction was exclusive was neither. It was never "actually litigated" by the parties; instead, Pierce included it in a proposed judgment submitted several months *after* trial. SER 8666 (probate court judge: "[t]hat's a very unusual thing to put in a judgment in Texas"). Nor was the "exclusive" jurisdiction language essential to the prior judgment; to the contrary, it was entirely irrelevant to the probate court's *own* power to render judgment.

For all of these reasons, the "state law" test applied by the Ninth Circuit violates principles at the very core of federal jurisdiction. This Court should reject it.[35]

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the decision below should be reversed.

Respectfully submitted,

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[35] An independent evaluation of Texas law demonstrates, as the district court concluded, that the probate court did not have exclusive jurisdiction over Vickie's claim. App. 165-70. Under then applicable Texas law, courts of general jurisdiction had concurrent jurisdiction with statutory probate courts over "all actions" involving *inter vivos* trusts and testamentary trusts, even if such actions were "appertaining to" or "incident to" probate estates. *Shell Cortez Pipeline Co. v. Shores*, 127 S.W.3d 286, 293 (Tex. App. 2004); *Mobil Oil Corp. v. Shores*, 128 S.W.3d 718, 724 (Tex. App. 2004). In any event, a claim "appertain[s] to . . . or [is] incident to" a probate estate only if its outcome will directly bear on distribution of the estate. *See, e.g., Sobel v. Taylor*, 640 S.W.2d 704, 706-07 (Tex. App. 1982) (claims against trustees in individual capacity for conduct before decedent's death can proceed in district court); *Jansen v. Fitzpatrick*, 14 S.W.3d 426, 434 (Tex. App. 2000) (suits to set aside deathbed conveyance for undue influence can proceed in district court). Vickie's tort claim against Pierce has no effect on the estate. App. 28, 162, 166-67.

(13)

No. 04-1544

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IN THE

Supreme Court of the United States

VICKIE LYNN MARSHALL,

Petitioner,

v.

E. PIERCE MARSHALL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the "probate exception" bars the exercise of bankruptcy jurisdiction over a cause of action that, under applicable state probate law, Petitioner was required to assert, and actually did assert unsuccessfully, in the state probate case.

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Rothermel v. Duncan, 369 S.W.2d 917 (Tex. 1963) 33

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Russell v. Ingersoll-Rand Co., 841 S.W.2d 343 (Tex. 1992) 37

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MISCELLANEOUS

Allan D. Vestal & David L. Foster, Implied Limitations of the Diversity Jurisdiction of Federal Courts 41 Minn. L. Rev. 1, 13 (1956-1957) 26

John H. Langbein, The Nonprobate Revolution and the Future of the Law of Succession, 97 Harv. L. Rev. 1108, 1109 (1984) 2, 20, 23

H.R. Rep. No. 95-595, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6004-09, 6010-11 .....46, 47

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Report of Commission on Bankruptcy Laws of the United States, H.R. Doc. 93-137, pt. (1973) 46

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PRELIMINARY STATEMENT

This case involves a dispute concerning the intended disposition of the assets of the late J. Howard Marshall II ("J. Howard"), as well as a conflict between a state probate court and a federal district court over which court should resolve that dispute. Petitioner is J. Howard's widow, Vickie Lynn Marshall, a/k/a Anna Nicole Smith ("Vickie"). Respondent is J. Howard's son, E. Pierce Marshall ("Pierce").

During his lifetime, J. Howard gave Vickie gifts of property and cash worth over $6 million. In his written estate plan ("Estate Plan"), J. Howard left all of his remaining assets to persons other than Vickie. Vickie commenced proceedings in the Texas probate court ("Probate Court") challenging the Estate Plan and contending that, contrary to that plan, J. Howard intended to give her an additional gift in the form of a separate trust to provide her with additional funds after his death. Among other allegations, Vickie asserted in the Probate Court that Pierce had "tortiously interfered" with her "expectancy of a gift." The Probate Court resolved all competing claims regarding J. Howard's intended disposition of his assets; held that J. Howard did not intend to give Vickie any additional gift; resolved all claims of improper conduct surrounding the Estate Plan and validated the plan; and dismissed Vickie's tortious interference claim.

The federal district court in California ("District Court") reached the opposite conclusion. Contrary to the Probate Court's judgment, the District Court ruled that the Estate Plan was invalid and did not reflect J. Howard's intent; that J. Howard instead intended to create a separate trust for Vickie; and that Pierce had "tortiously interfered" with her "expectancy of a gift" by manipulating the Estate Plan. The question presented is whether, under this Court's precedents addressing federal court jurisdiction over probate matters, the District Court had jurisdiction to adjudicate these issues and determine that Pierce should be liable for J. Howard's failure to create a trust for Vickie out of the assets in his Estate Plan.

For nearly two hundred years, this Court has adhered to the rule that federal courts lack jurisdiction over a claim that involves probate matters if the adjudication of the claim would "interfere" with probate proceedings or judgments. The Court's precedents

establish that interference exists, and a federal court lacks jurisdiction over a claim otherwise within its jurisdiction, if the adjudication of the claim in federal court would require (1) exercising the core probate functions of a probate court, such as administering an estate or determining the validity of an estate planning instrument; (2) disregarding or setting aside a probate court's probate judgment; or (3) resolving critical questions of law or fact that, in the performance of its core probate functions, a probate court must decide. The adjudication of Vickie's claim in federal court involves each type of interference. Accordingly, the court of appeals correctly held that the District Court lacked jurisdiction in this case.

STATEMENT

J. Howard met Vickie in 1991 at a club where she danced. PA[1] 67. They were married in 1994, when he was eighty-nine and she was twenty-six. PA 3. The marriage lasted fourteen months, ending with J. Howard's death on August 4, 1995. ER 95; PA 7.

In 1982, J. Howard established his Estate Plan, consisting of two principal instruments: a will (as amended, the "Will"), and a living trust (as amended, the "Trust"). ER 131, 264, 510, 819, 1018, 2623. Years before J. Howard met Vickie, he placed all of his assets in the Trust and designated Pierce and others to receive these assets upon his death. ER 392, 528, 644; PA 3. The Will is what is known as a "pourover" will because it provides that, upon J. Howard's death, all of his property not already in the Trust must be transferred to the Trust. ER 514-16. Because J. Howard intended the Trust to govern the distribution of his property upon his death, the Trust, rather than the Will, was his principal estate-planning device. For probate purposes, the Trust is what is known as a "will substitute" because it performs all the functions of a traditional will. *See* John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1109 (1984) ("*Langbein*").

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[1] "PA" refers to the Petition Appendix. "JA" refers to the Joint Appendix. "ER" refers to certain "excerpts of record" filed in the Ninth Circuit pursuant to that court's local rules.

During his lifetime, J. Howard – a lawyer and former Trusts and Estates professor at the Yale Law School – never designated Vickie as a beneficiary under his Will or Trust, even though he amended these instruments repeatedly both before and after their marriage. ER 510, 647-51, 819; PA 3-4. Instead, during his lifetime, J. Howard gave Vickie gifts of cash and other property worth over $6 million that he obtained largely with borrowed funds. ER 2547-48, 3302. These gifts are evidenced in part by an "Act of Donation," which conveyed substantial property to Vickie "in consideration of her marriage to me." PA 6. Disappointed by her exclusion from J. Howard's Will and Trust, Vickie brought claims in both state and federal court, leading to ten years of contentious litigation between herself and Pierce.

The Initial Probate Proceedings. Vickie's attempts to challenge the Estate Plan began four months before J. Howard's death, when she commenced proceedings in the Probate Court ("Probate Case") seeking a declaration concerning the Trust's validity, JA 9-12, and alleging that Pierce had tortiously interfered with her property rights with respect to J. Howard's assets, *id.* 11-12; *see* PA 11.[2]

Three days after J. Howard died, Vickie filed a further application in the Probate Court, seeking a declaration that J. Howard had died intestate. PA 11. Pierce opposed this application on the ground that his father *had* left a will, and sought to admit J. Howard's Will into probate. *Id.* Vickie thereafter contested the Will, *Id.*, and further challenged the validity of the entire Estate Plan, ER 2864, 2870-72. Vickie did not dispute that J. Howard had given her numerous gifts. Instead, she claimed that J. Howard

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[2] Vickie plainly errs in contending (Pet. Br. 3 & n.4) that she did not participate initially in the Probate Case. The record demonstrates that Vickie commenced the Probate Case and, from the beginning, alleged in the Probate Case that the Trust was invalid and that Pierce had tortiously interfered with her alleged entitlements. ER 5620. Although Pierce moved early in the Probate Case to dismiss her initial allegations, the Probate Court declined to do so, and Vickie's initial allegations, amended and supplemented in her subsequent filings in the Probate Court, remained pending until the Probate Court entered its final judgment dismissing all of her claims.

intended to give her much more of his property and that the only reason he did not was that Pierce had wrongfully thwarted his intent. JA 26-31. Vickie alleged that J. Howard had instructed his attorneys to create a "catch-all trust" for her benefit containing substantial property, ER 2845-46, but that Pierce had intervened to prevent this instruction from being carried out, ER 2851-53. She contended that Pierce had procured through forgery, "fraud, mistake, duress, and/or undue influence," a power of attorney from his father, as well as an amendment to the Trust that rendered it irrevocable. ER 2850. Vickie further alleged that Pierce used the power of attorney and other undue influence to make it impossible for his father to give assets to her. JA 28-31. Vickie requested that the Probate Court declare both the Will and Trust invalid so that the bulk of J. Howard's property could be distributed under state rules of intestacy more favorable to her. ER 2870-72.

Pierce filed a counterclaim asking the Probate Court to issue a declaratory judgment that the Will and Trust were valid. PA 11. The Probate Court proceeded to resolve the competing claims regarding J. Howard's intent; any improper conduct surrounding the Will and Trust; the validity of his Estate Plan; and the ultimate disposition of his assets. JA 119, 124.

The Initial Bankruptcy Proceedings. While the Probate Case was under way, Vickie's housekeeper obtained a sexual harassment judgment against her for more than $800,000. ER 3048. In response, on January 25, 1996, Vickie filed a chapter 11 case ("Bankruptcy Case") in the bankruptcy court in Los Angeles ("Bankruptcy Court"). PA 12.

On May 7, 1996, Pierce filed a "non-dischargeability" complaint in the Bankruptcy Court asking that the court deny Vickie a discharge of any debt that she might owe arising from a defamation suit that Pierce had filed previously in state court against Vickie and her lawyers. ER 922-26.[3] Shortly thereafter,

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[3] Because of the intervention of Vickie's Bankruptcy Case and the imposition of the automatic stay, *see* 11 U.S.C. § 362, Pierce dismissed Vickie without prejudice from the pending state court defamation action, and proceeded solely against her attorneys. Pierce settled with one of the attorneys, and obtained an $8.5 million jury verdict against the other, which he also subsequently settled.

Vickie filed in the Bankruptcy Court a "counterclaim" to Pierce's non-dischargeability complaint asking the Bankruptcy Court to adjudicate her claim that Pierce had tortiously interfered with her expectancy of a gift from J. Howard.[4] JA 23-25. This claim is indistinguishable from the tortious interference claim that Vickie filed in the Probate Court. *Compare* JA 23-24 *with* JA 28.[5] Vickie alleged in the Bankruptcy Court that J. Howard had promised to provide her with an "inheritance and/or gift" and that Pierce had prevented J. Howard from effecting this inheritance or gift through his Will or Trust by, among other things, "obstructing the express wishes of Mr. Marshall, by deceiving Mr. Marshall, . . . by preparing documents and by ostensibly making transfers of property of Mr. Marshall [in and out of the Trust] which were inconsistent with his expressed wishes and desires." JA 24.

On July 8, 1996, Pierce moved to dismiss Vickie's counterclaim, arguing that the Bankruptcy Court lacked jurisdiction to resolve her allegations because they were subject to resolution only in the pending Probate Case. ER 957-60; PA 13. The Bankruptcy Court denied Pierce's motion on August 14, 1996. ER 3366.[6] On March 8, 1999, the Bankruptcy Court confirmed

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[4] The Bankruptcy Court subsequently granted Vickie's motion for summary judgment on the non-dischargeability complaint. ER 2758. Instead of resolving the narrow bankruptcy question of whether the defamation claim was subject to discharge, the Bankruptcy Court summarily determined that Vickie had no liability for any defamatory conduct. ER 2757.

[5] Vickie plainly errs in claiming (Pet. Br. 3) that her filing in the Bankruptcy Court was the first time that she alleged her tortious interference claim in any court. As noted, Vickie first challenged the validity of the Trust in 1995 when she commenced the Probate Case and alleged at that time that Pierce had tortiously interfered with her rights. ER 5615-17.

[6] Vickie errs in claiming (Pet. Br. 4.) that Pierce waited until 1999 to move to dismiss her tortious interference claim for lack of jurisdiction. Pierce first moved to dismiss her claim much earlier. ER 957, 1049-69. Pierce also sought to have the bankruptcy litigation withdrawn to the District Court. ER 2019; *see* 28 U.S.C. § 157(d). On January 12, 1999, after the District Court had granted Pierce's withdrawal motion, the bankruptcy judge stated that he intended to submit a secret memorandum

Vickie's chapter 11 plan, thereby resolving Vickie's bankruptcy petition. ER 2200-01. Even though Vickie's Bankruptcy Case had ended, the Bankruptcy Court proceeded to adjudicate her state law probate claim against Pierce.

The Bankruptcy Court's Subsequently Vacated Judgment. In October, 1999, at the beginning of the Bankruptcy Court's hearings on Vickie's tortious interference claim, the presiding judge held a press conference in open court during which he invited members of the press to ask questions about the pending case. ER 2393-95.[7] During the hearings that followed in the Bankruptcy Court, Pierce was precluded from contesting the essential elements of Vickie's claim as a sanction for alleged discovery abuse, a sanction that Pierce vigorously disputed and that the District Court subsequently vacated. ER 2173-75.[8]

On September 27, 2000 – on the eve of jury selection in the Probate Case – the Bankruptcy Court issued a decision in favor of Vickie, based on "factual determinations" that the court entered

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(the "Secret Memo") to the district judge "to assist in his review of the matter," and that the Secret Memo would not be available to Pierce. ER 2158. The contents of the Secret Memo have never been disclosed. ER 2207-08. The District Court acknowledged receipt of the Secret Memo, ER 2207, and vacated its prior order withdrawing the litigation, ER 2209, 2211.

[7] A *Newsweek* reporter took the podium to ask questions. ER 2393-95. The presiding judge answered them and discussed the relationship between the Bankruptcy Case and the Probate Case. *Id.*

[8] The Bankruptcy Court initially issued its sanctions order on February 2, 1999, ER 2172-75, which the District Court later vacated for lack of evidentiary support, PA 14. On May 20, 1999, the Bankruptcy Court reissued its sanctions order with the addition of some footnotes and without conducting an evidentiary hearing. *Id.* at 14-15. On January 18, 2000, the Bankruptcy Court *sua sponte* vacated its reinstated sanctions order. *Id.* at 16. Nevertheless, the Bankruptcy Court relied on the then-vacated sanctions order in its September 28, 2000 judgment against Pierce. *Id.* at 16-17. Pierce again appealed the sanctions determination to the District Court, which again vacated the sanctions as part of its vacatur of the Bankruptcy Court's ultimate judgment against Pierce. *Id.* at 186-87. In fact, Pierce did not commit any discovery abuse, as demonstrated to the court of appeals. *See* JA 190-99.

solely as a discovery sanction. PA 16. Among other things, the court found (as a discovery sanction) that Pierce had fraudulently altered the Trust to make it irrevocable and concluded that Vickie "would have received half of the community property but for [Pierce's] actions in making the . . . Trust irrevocable." ER 3036-37. The court reasoned that this was so because, under its interpretation of Texas law, J. Howard's failure to include Vickie in his Will entitled her to a "widow's election," pursuant to which she was "entitled to receive half of the community property that passes through [J. Howard's] estate." *Id.* at 3037. The court determined that, if the Trust had remained revocable, its assets would have been part of the estate subject to Vickie's "widow's election." *Id.*

On October 6, 2000, the Bankruptcy Court issued a revised opinion offering a new theory of the case. PA 16. Whereas the prior decision had concluded that Pierce had tortiously interfered with Vickie's right to inherit J. Howard's wealth, ER 3033, the new decision held that J. Howard had, instead, intended to give Vickie a gift during his lifetime by transferring a substantial portion of his property from the Trust to a separate "catch-all trust" for Vickie. ER 3049. The court determined that Pierce had tortiously interfered with this expectancy (again as a discovery sanction, ER 3049 n.5), by firing the lawyer that J. Howard had instructed to create the "catch-all trust." ER 3049, 3054. Under these new findings, the court awarded Vickie $449,754,134, ER 3055, calculated, in part, based on the court's assumptions about increases in the price of oil, ER 3049 n.7. The court subsequently awarded Vickie an additional $25 million in punitive damages. JA 40-44.

Pierce appealed to the District Court. On June 19, 2001, the District Court agreed that the state law dispute between Vickie and Pierce did not fall within the Bankruptcy Court's "core" jurisdiction and therefore vacated the Bankruptcy Court's judgment. PA 22, 171-86. The District Court, however, rejected Pierce's argument that the District Court lacked jurisdiction over Vickie's claim under the "probate exception" to federal jurisdiction, PA 158-70, and declared that it would adjudicate Vickie's probate claim *de novo*, PA 186-87.

The Probate Jury Verdict and Final Judgment. On September 18, 2000, the Probate Court commenced a jury trial to

resolve the pending claims regarding J. Howard's intentions; whether the Will and Trust were tainted by misconduct; the validity of the Will and Trust; allegations of improper estate-planning transactions; and whether Pierce had tortiously interfered with Vickie's alleged expectancies. JA 106. Whereas the Bankruptcy Court's hearings lasted five days, the probate jury trial lasted over five months, ending on March 1, 2001. *Id.* While the Bankruptcy Court heard from only a handful of witnesses and refused to hear witnesses that would have testified on Pierce's behalf, the Probate Court heard the testimony of over forty witnesses for all the parties and received hundreds of items of evidence. ER 4066-71; JA 106-140.

Vickie participated fully in the Probate Case. According to the probate judge's record, Vickie's counsel spent 3590 minutes examining witnesses, including 1031 minutes questioning Pierce. ER 4070. Vickie's counsel also questioned fourteen other witnesses, including all five witnesses who later testified on the same issues before the District Court. ER 8, 4070-71, 4173-75. Vickie herself testified for approximately six days, ER 4071; called seven witnesses as part of her case in chief, ER 4069-70; and called three rebuttal witnesses, ER 4070.[9]

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[9] Vickie also fully litigated her tortious interference claim in the Probate Case. JA 26-32. Prior to trial, Vickie identified the causes of action against Pierce that she proposed to submit to the jury, *id.* 33, including her claim of tortious interference with a gift, and allegations of fraud, duress, and undue influence, *id.* 33-35. On October 2, 2000, Vickie's counsel declared in his opening statement that "[t]his is a case about tortious interference with an intent to give an *inter vivos* gift." *Id.* 36-37. In discussing the "evidence" that he intended to present, Vickie's counsel referred to exactly the same "evidence" that Vickie later relied on in federal court. ER 4124-27, 4138, 4147, 4164-66; PA 55-130. At the end of the probate trial, and after the Bankruptcy Court entered its later-vacated decision in her favor, Vickie moved to dismiss her claims in the Probate Court. PA 17-18. The Probate Court warned Vickie that withdrawing her claims in the Probate Case would not preclude the Probate Court from determining the validity of J. Howard's Will and Trust; all of the various challenges to the Estate Plan; and J. Howard's true intentions regarding the disposition of his property, including whether he ever intended to make any gift to her; and that she would be

On March 7, 2001, the Texas jury returned its verdict upholding the validity of J. Howard's Trust and Will and rejecting the various claims seeking recoveries at odds with the Estate Plan. JA 55, 62. The Texas jury rejected all of the various allegations that the Trust and Will did not reflect J. Howard's true intentions or were the subject of any misconduct. These included the allegation that the Trust had been forged or altered; that J. Howard had been the victim of fraud, duress, manipulation, or undue influence; that Pierce had interfered with J. Howard's intent; and that J. Howard lacked the requisite mental capacity when he executed his Will and Trust. JA 55-56, 62, 75-76, 84-85, 93. [10] The jury also rejected Vickie's claim that J. Howard promised her half of his assets. JA 93.

On December 7, 2001, the Probate Court entered its final probate judgment ("Probate Judgment"). JA 106.[11] In that judgment, the Probate Court admitted J. Howard's Will to probate, finding the Will to be genuine and valid and not the product of improper conduct. *Id.* 118-20. The court also found the Trust to be genuine and valid and not the product of improper conduct. *Id.* 124. The court further determined that any and all claims by Vickie regarding J. Howard and his property, "including but not

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bound by the court's determination. *Id.* at 18. Vickie insisted nonetheless on withdrawing her claims. *Id.* Vickie remained as a counter-defendant in the case, owing to Pierce's amended declaratory judgment action to determine her rights and claims (which the Probate Court refused to dismiss, ER 3446, 3472), and, as noted, she actively participated in the Probate Case through its conclusion. Notably, following the Bankruptcy Court's ruling in her favor, Vickie did not establish that this decision was binding in the Probate Case. Instead, she sought and obtained a series of injunctions from the Bankruptcy Court enjoining the Probate Case. ER 3807-16. The Probate Court then enjoined Vickie from enforcing her injunctions. ER 3922. The District Court later reversed the Bankruptcy Court's injunctions. ER 3989-90.

[10] Vickie thus plainly errs in claiming (Pet. Br. at 5) that the jury verdict addressed only one question pertaining to her.

[11] The court entered its initial judgment on August 15, 2001, an amended judgment on October 15, 2001, and its final judgment on December 7, 2001. The final judgment, quoted in the text, alters the prior judgments in ways not relevant here.

limited to claims that [J. Howard] intended but failed to give her or to leave her any portion of such property during his life or upon his death, were required by law to have been asserted as compulsory counterclaims in this proceeding." *Id.* 129. On the merits of Vickie's claim, the Probate Court ruled that "[J. Howard] did not intend to give and did not give to [Vickie] a gift or bequest from the Estate of [J. Howard] or from the [Living Trust] either prior to or upon his death." *Id.* 130. The court also ruled "that [Vickie] does not possess any interest in and is not entitled to possession of any property within the Estate of [J. Howard] or any property [of the Trust] because of any representations, promises, or agreements." *Id.* The Probate Court held that (1) all of Vickie's claims were resolved and dismissed, *id.* 127-28; (2) Vickie was entitled to "take nothing" from Pierce, *id.* 130-31; and (3) Pierce was entitled to his inheritance free and clear of any claim by Vickie, *id.* 125-26. Each and every one of the foregoing matters were fully litigated in the Probate Case, including the Probate Court's determination that it had exclusive jurisdiction under the Texas Probate Code over each of the foregoing, and its conclusion that Vickie's claim was required to be brought in the Probate Case. JA 116, 130; ER 2522-25, 2683-87.[12]

The Federal District Court Proceedings and Judgment. Soon after the Probate Court entered its Probate Judgment, and *prior* to the commencement of trial in the District Court, Pierce moved in the District Court to dismiss Vickie's pending state law probate claims. ER 4733-4742. The District Court denied the motion. *Id.* The court held that the Probate Court had misunderstood Texas law when it concluded that Vickie was required to bring her claim of tortious interference in the Probate Case. ER 5202. The court further concluded that it was not required to give preclusive effect to any state court judgment entered after a federal trial had commenced, even if the state judgment was issued prior to final judgment in the federal case. ER 5204-06.[13]

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[12] Vickie thus plainly errs in asserting (Pet. Br. at 6) that the Probate Court did not resolve her tortious interference claim.

[13] The District Court also held initially that it was not required to give preclusive effect to the Probate Judgment because it was not, at that time,

On March 7, 2002, three years after the end of Vickie's Bankruptcy Case, and three months after the Probate Court's final Probate Judgment, the District Court entered its decision on Vickie's state law tortious interference claim. PA 39, 147.[14] Acknowledging that Texas courts had not recognized a claim for "tortious interference" with an "expectancy of an *inter vivos* gift" under Texas law, *id.* 130, the court concluded nonetheless that there was such a tort in Texas, *id.* 132.[15] The elements of that tort, the court predicted, would be "(1) the existence of an expectancy; (2) a reasonable certainty that the expectancy would have been realized but for the interference; (3) intentional interference with the expectancy; (4) tortious conduct involved with the interference; and (5) damages." *Id.* 132-33. The court found that Vickie had established each element, based on findings that directly contradicted the core findings reached by the Probate Court in validating J. Howard's Will and Trust and disposing of his property.

For example, although the Texas jury had specifically found that J. Howard never agreed to give Vickie half of his estate, the District Court found that "J. Howard made numerous promises to Vickie that she would receive half of what he owned." *Id.* 133. The District Court accepted Vickie's claim (rejected by the Probate Court) that J. Howard intended to create a "catch-all" trust for Vickie "that would provide her with money after his death," *id.*

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final. ER 5203-04. By the time the District Court entered its judgment, however, it acknowledged that the Probate Judgment had long since attained finality. PA 41.

[14] Vickie contends that, as part of its review, "the district court examined all the evidence before the bankruptcy court, plus substantial documentary evidence that Pierce previously had refused to produce." Pet. Br. 6. The "documentary evidence that Pierce previously had refused to produce," however, consisted only of the privileged counsel files of Pierce's attorneys, containing such information as trial strategy memos and confidential attorney-client communications. All non-privileged information had already been produced, both in the Bankruptcy Court and in the Probate Court. Vickie obtained Pierce's confidential attorney-client communications as a result of the District Court's summary decision to give them to Vickie. *See* ER 4063-64.

[15] It is undisputed that Texas law governs Vickie's claim.

134, and that "he wanted Vickie to have the benefit of the gift after he had passed away," *id.* 82. Although the Probate Court had found that the Will and Trust, and all amendments thereto, were valid and untainted by misconduct, the District Court found that Pierce tortiously interfered with Vickie's expectancy by falsifying and backdating amendments to, and transactions with, the Trust, *id.* 134-36, and by engaging in illegitimate "estate planning transactions for J. Howard," *id.* 136. Disagreeing with the Probate Court's contrary holdings, the District Court also determined that the Trust had been tampered with and forged. *Id.* 125-26. Based on these findings, the District Court awarded Vickie $88,585,534.66 in compensatory and punitive damages. *Id.* 147.[16]

The Decision of the Court of Appeals. Pierce appealed to the Ninth Circuit, arguing that the federal courts lacked jurisdiction to resolve Vickie's claim in light of the long-standing probate exception to federal jurisdiction, and that, in the alternative, the District Court violated the Full Faith and Credit Act by failing to give preclusive effect to the Probate Judgment. Agreeing with the first contention, the Ninth Circuit declined to address any other grounds for reversal, and vacated the District Court's judgment. PA 2-3.[17]

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[16] In conducting its review, the District Court refused to hear many of Pierce's percipient witnesses, but heard all of Vickie's witnesses. ER 5274-87. Although the District Court based its judgment on voluminous "findings" adverse to Pierce, these findings are not based on actual evidence, for all of the evidence – including the testimony of the percipient witnesses who were permitted to testify – was that J. Howard never intended to give Vickie the gift that she claims, and that Pierce never interfered with any such gift. A full analysis of the clear error in the District Court's unsupported "findings" was presented to the court of appeals. *See* JA 143, 212-239. Moreover, when pressed at oral argument in the court below, Vickie's counsel could not identify any actual evidence in the record in support of her claim that J. Howard intended to create a trust for her or that Pierce had suppressed the trust or otherwise interfered with its creation or fulfillment, and no such evidence exists. JA 240-45.

[17] Pierce also challenged the District Court's judgment on four additional grounds: (1) Vickie's alleged cause of action of "tortious interference" with an "expectancy of a gift" does not exist as a matter of Texas law;

The court of appeals began by recognizing that this Court's cases have long established that "matters of strict probate are not within the jurisdiction of the courts of the United States." PA 24 (quoting *Sutton* v. *English*, 246 U.S. 199, 205 (1918)). While federal courts may resolve some disputes relating to a probate estate, they may not "interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court." *Id.* (quoting *Markham v. Allen*, 326 U.S. 490, 494 (1946) (internal quotation marks omitted). The court rejected Vickie's contention that the probate exception applies only in diversity cases, PA 25-26, noting that the "evil to be avoided is federal interference with state probate proceedings," an evil that can arise as easily from a bankruptcy proceeding as from a diversity suit. *Id.* 26 (citation omitted). The court also relied on *Harris v. Zion Sav. Bank & Trust Co.*, 317 U.S. 447 (1943), in which this Court applied the probate exception to bar the exercise of bankruptcy jurisdiction over a decedent's property. *Id.*

The Ninth Circuit then turned to the scope of the probate exception. Relying on this Court's description of the exception in *Markham*, the court held that, in addition to preventing a federal court from directly probating a will or administering an estate, PA 27, the probate exception prevents a federal court from "exercising jurisdiction over the matter [if] the federal court would: (1) interfere with probate proceedings; (2) assume general jurisdiction of the probate; or (3) assume control over property in the custody of the state court," *id.* 28 (citations omitted). The court added that the "reach of the probate exception encompasses not only direct challenges to a will or trust, but also questions which would ordinarily be decided by a probate court in determining the validity of the decedent's estate planning instrument." *Id.* 29. "Such questions include fraud, undue influence upon a testator, and

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(2) the District Court violated Pierce's due process rights by failing to hear his evidence; (3) the District Court's "findings" of fact adverse to Pierce were clearly erroneous; and (4) the District and Bankruptcy Courts lacked jurisdiction to adjudicate her claim because Vickie's Bankruptcy Case had ended and any resolution of the claim would have no impact on her bankruptcy estate or creditors.

tortious interference with the testator's intent." *Id.* Vickie's claims, the court of appeals held, fell within the probate exception because they required the federal court to determine how J. Howard intended to dispose of his assets upon his death and to judge the validity of J. Howard's estate-planning instruments. *Id.* 30.

The court rejected Vickie's contention that her federal suit did not interfere with the Probate Case because it was a suit against Pierce *in personam*, rather than a claim against the estate. PA 31. "Regardless of the way in which Vickie Lynn Marshall seeks to characterize her suit, 'it is in substance nothing more than a thinly veiled will contest.'" *Id.* (citation omitted). In awarding damages against Pierce in a sum equal to the amount that the District Court thought Vickie should have received from the estate, "the power of the Texas probate court was negated." *Id.* 32. The court further rejected Vickie's claim that the probate exception did not apply because her claim arose from interference with an *inter vivos* gift rather than a testamentary bequest. *Id.* 33. "The probate exception applies not only to contested wills, but also to trusts that direct a post mortem disposition of the trustor's property." *Id.* Such a trust, the court noted, "is a recognized will substitute." *Id.*

Applying the probate exception to such claims, the court explained, was necessary in light of the practical function served by the exception. PA 34-35. Under Texas law (as in most states), "all claims against the decedent and his estate were required to be made in the probate proceedings," including Vickie's claim to an entitlement to a portion of J. Howard's assets, a claim that "went to the very essence of the testamentary instruments." *Id.* at 35. Similarly, any claim that Pierce improperly removed assets from the estate prior to his father's death, the court held, was "clearly within the exclusive jurisdiction of the probate courts of Texas." *Id.* 36. The Ninth Circuit therefore vacated the District Court's decision. PA 37-38.

SUMMARY OF ARGUMENT

As this Court has long recognized, the States have the power and the duty to establish probate systems to facilitate the final disposition of a decedent's assets. Like other States, Texas has discharged this responsibility by vesting its probate courts with exclusive jurisdiction over (1) the decedent's probate estate; (2) the

appointment and supervision of administrators of the estate; (3) the determination of the validity of the decedent's estate plan (or that the decedent died intestate); and (4) the resolution of all claims and controversies necessary to the performance of these core probate functions. Like other States, Texas has also proscribed rules that protect the exclusivity and finality of probate proceedings and judgments in its courts. Review of these protections demonstrates that they are critical to the sound functioning of the Texas probate system.

For nearly two centuries, this Court's probate exception doctrine has served to protect the administration of state probate proceedings by sheltering from federal interference the exclusive jurisdiction of state probate courts to perform their core probate responsibilities. As this case demonstrates, the exercise of federal jurisdiction over controversies and issues that probate courts ordinarily resolve in performing their core probate functions invites only confusion, diseconomy, and conflict among state and federal courts at the expense of the sound administration of probate proceedings and the harmonious relations among state and federal tribunals. This is perhaps most vividly illustrated in this case by the fact that, following the Bankruptcy Court's entry of its later-vacated judgment, the Bankruptcy Court enjoined ongoing probate proceedings in the middle of the Probate Court's jury trial.[18]

This Court's precedents make plain that the touchstone for application of the probate exception is interference with probate proceedings. The Court's precedents further establish that interference exists, and that a federal court lacks jurisdiction over a claim otherwise within its jurisdiction, if the adjudication of the claim in federal court would require the federal court to (1) exercise the core probate functions of a probate court, such as administering an estate or determining the validity of an estate planning instrument; (2) disregard or set aside a probate court's probate judgment; or (3) resolve critical questions of law or fact that, in the performance of its core probate functions, a probate court must decide. In this case, the adjudication in federal court of

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[18] *See* note 9 *supra* (discussing injunctions).

Vickie's claim for "tortious interference" with an "expectancy of a gift" involves all three types of interference.

First, the adjudication of Vickie's claim in federal court involves the exercise of core probate functions because it necessarily requires the determination that J. Howard intended to give Vickie a gift from his assets in the form of a separate "catch-all" trust in competition with his written Trust governing the disposition of all of his property. Unless J. Howard actually intended to establish this catch-all trust, Vickie can have no claim. Yet establishing that a decedent truly intended to create an instrument disposing of his assets in competition with his written estate plan lies within the core probate functions of a Texas probate court, and the exercise of federal court jurisdiction over such claims negates the exclusive jurisdiction of the probate court over the same matter.

Second, the adjudication of Vickie's claim in federal court requires the federal court to disregard the Probate Court's Probate Judgment. Under Texas law, the Probate Court's decision validating J. Howard's Estate Plan extinguished Vickie's claim as a matter of well-established state law. The District Court's adjudication of Vickie's tort claim is also completely inconsistent with the Probate Court's prior findings and conclusions, made in connection with its validation of the Estate Plan, that J. Howard never intended to give Vickie the gift that she claims, and that his Estate Plan is not tainted by misconduct. It is also wholly inconsistent with the Probate Court's *in rem* determination quieting title to J. Howard's assets in Pierce and determining that Pierce is entitled to his inheritance free and clear of any claim by Vickie. Moreover, Texas law provides that probate judgments are binding against the world, except as applicable state procedures permit them to be set aside, and the adjudication of Vickie's claim in federal court impermissibly circumvents this salutary rule.

Third, the adjudication of Vickie's claim in federal court requires the resolution of critical questions of law or fact that the Texas Probate Court typically decides in performing its core probate functions, and actually did decide in this case, including the determination of J. Howard's intent regarding the disposition of his assets, and any misconduct surrounding his Estate Plan, each of which are core elements of Vickie's claim. It also requires the determination that J. Howard's Estate Plan was invalid because

Vickie cannot establish a legitimate expectancy of a gift without demonstrating that the Estate Plan is invalid. Here, the Probate Court, in determining that J. Howard's Estate Plan is valid, resolved all of these issues against Vickie in its Probate Judgment, and no clearer case of interference can be shown than the District Court's assumption of jurisdiction over precisely the same issues.

Although Vickie attempts to exclude her tort claim from the scope of the probate exception by artful pleading, her claim is, in substance, a challenge to J. Howard's Estate Plan. Similarly, Vickie's contention that the probate exception does not apply in bankruptcy is also unsound. The probate exception is best conceived as a presumption that, when Congress establishes a font of federal jurisdiction, it does not intend that jurisdiction to be exercised in ways that would interfere with probate proceedings. The evils that the probate exception seeks to avoid arise no less in the exercise of bankruptcy jurisdiction than in other areas, and there is no reason to believe that Congress intended bankruptcy courts to exercise greater probate jurisdiction than federal district courts sitting in diversity.

Finally, there is no merit to Vickie's contention that the probate exception should be subsumed within available abstention doctrines. Apart from the fact that this Court flatly rejected the same invitation in construing the analogous domestic relations exception in its decision in *Ankenbrandt v. Richards*, 504 U.S. 689, 706 n.8 (1992), the policies underlying the probate exception clearly would be ill-served by re-characterizing a nearly two-hundred-year-old jurisdictional doctrine into a largely discretionary abstention concept. For all of these reasons, the decision of the court of appeals should be affirmed.

ARGUMENT

A. Probate Courts Perform Specialized Functions That Require Exclusive Jurisdiction.

This Court stated almost a century ago that "[i]t is the duty of the sovereign to provide a tribunal, under whose direction the just demands against the estate may be determined and paid, the succession decreed, and the estate devolved to those who are found to be entitled to it" and that "somewhere the power must exist to decide finally, as against the world, all questions which arise in the settlement of the succession." *Tilt v. Kelsey*, 207 U.S. 43, 55-56

(1907). In the United States, that duty and power belongs to the sovereign States, which have discharged their duty through the establishment of state probate systems. This Court has long recognized that this "is a sovereign right which may not be readily frustrated." *Riley v. New York Trust Co.*, 315 U.S. 343, 355 (1942); *see also Lalli v. Lalli*, 439 U.S. 259, 268 (1978) (recognizing a State's right to "provide for the just and orderly disposition of property at death" and stating that "[w]e long have recognized that this is an area with which the States have an interest of considerable magnitude"); *Case of Broderick's Will*, 88 U.S. 503, 509 (1874).

Although the details of state probate systems differ from one jurisdiction to the next, they typically employ state probate courts to perform a variety of vital probate functions. It is evident that probate courts could not effectively perform their core probate duties without exclusive jurisdiction to do so. Recognizing this, state probate systems (of which Texas is typical, *see* TEX. PROB. CODE ANN. ("TPCA") § 1 *et seq.*),[19] generally vest their probate courts with exclusive jurisdiction over several categories of core probate matters, and incorporate mechanisms to protect both the exclusivity and finality of probate jurisdictions and judgments.

Probate Estate. When an individual dies, state probate law typically provides for the marshalling of the decedent's assets into a "probate estate," and vests its probate courts with *in rem* jurisdiction over the estate and all property within it. As this Court has long acknowledged, *in rem* jurisdiction of this kind is necessarily exclusive to avoid competing struggles among courts over possession and control of the same property, and applies not only to formal probate estates but also to *in rem* and *quasi in rem* disputes over property held in trust. *Princess Lida v. Thompson*, 305 U.S. 456, 466 (1939) ("the principle applicable to both federal and state courts that the court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of the other . . . applies as well where suits are brought to marshal assets, administer trusts, or liquidate estates, and in suits of a similar nature where, to give effect to its jurisdiction, the court

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[19] Although the Texas Probate Code has since been amended, the 1999 version applies here.

must control the property"); *Gelston v. Hoyt*, 16 U.S. 246, 315 (1818). Under the Texas Probate Code, the Texas probate courts are vested with exclusive *in rem* jurisdiction over all probate estates and over trust property related to an estate. TPCA §§ 5A(b), 5A(c)(2), 5(e); *Mooney v. Harlin*, 622 S.W.2d 83, 85 (Tex. 1981) (noting the *in rem* nature of Texas probate proceedings).[20]

Administration. After an individual dies, a probate court ordinarily appoints and supervises a representative to administer the decedent's estate, with the responsibility for collecting and maintaining the decedent's property for distribution among creditors and beneficiaries. *See generally* TPCA Chs. 7-8; *Bailey v. Cherokee County Appraisal Dist.*, 862 S.W.2d 581, 584-85 (Tex. 1993) (observing that administrator, "as trustee of the estate property, assumes legal title" and is responsible for paying court-ordered debts). In Texas, this includes the administration of trust property related to a decedent's estate. TPCA §§ 5A(b), 5A(c)(2), 5(e). This procedure could not work effectively if multiple courts had concurrent jurisdiction to appoint and instruct multiple administrators of the same property. Accordingly, the probate court's jurisdiction to appoint and instruct the administrator is exclusive. *E.g.*, TPCA § 5A(b); *Perfect Union Lodge of San Antonio v. Interfirst Bank of San Antonio N.A.*, 748 S.W.2d 218, 221 (Tex. 1988) (probate court had jurisdiction to direct sale of trust property for benefit of decedent's intended beneficiaries); *Byers v. McAuley*, 149 U.S. 608, 614 (1893).[21]

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[20] In some counties in Texas, particularly those that do not have large metropolitan centers, Texas has assigned the exercise of probate jurisdiction under the Texas Probate Code to statutory courts that perform functions other than adjudicating probate matters. *See* TPCA § 5(b); *Sutton v. English*, 246 U.S. 199, 207-08 (1918) (discussing exclusive jurisdiction of Texas county court over probate claim of undue influence). In this case, however, the Probate Case was administered by a statutory probate court vested with probate jurisdiction under Texas law.

[21] Although not implicated here, an exception exists for property located outside the territorial jurisdiction of the probate court. *See Hanson v. Denkla*, 357 U.S. 235, 248-49 (1958).

Validation of Estate Plan and Resolution of Related Controversies and Issues. As part of the process of reaching a "firm and perpetual" determination governing who is entitled to receive a decedent's property, state probate law typically vests probate courts with jurisdiction to declare the validity of a decedent's estate plan (or to determine that the decedent died intestate, so that the decedent's property remaining after the payment of debts may be distributed in accordance with the State's intestacy rules). An estate plan is either valid "against the world" or it is not, and this determination is not feasibly divisible among courts exercising concurrent jurisdiction over disparate groups of interested parties. Probate proceedings are, by design, collective in nature, to address in one place and at one time the interests of all potential beneficiaries, and in Texas, only the probate court has jurisdiction to declare the validity of a decedent's estate plan. TPCA §§ 5(c) & 5A; *English v. Cobb*, 593 S.W.2d 674, 676 (Tex. 1979) (the "obvious purpose" for the broad grant of exclusive jurisdiction to the state probate courts was "so that such courts could more fully and quickly settle a decedent's estate in one proceeding").

Historically, probate proceedings focused on the formal probate of wills. Over the past century, however, a variety of "will substitutes" have overtaken formal wills as the primary means of transferring a decedent's wealth upon his death. Will substitutes may take several forms and include *inter vivos* trusts such as the Trust at issue in this case. *Langbein* at 1117. Such instruments are functionally indistinguishable from wills to the extent that they reserve to their owner until death complete control over property governed by the instrument in question, including the power to name and change beneficiaries. *Id.* 1109. Accordingly, disputes regarding the validity and administration of will substitutes, like the *inter vivos* Trust in this case, are also typically subject to exclusive probate court jurisdiction. In Texas, the probate courts have exclusive jurisdiction to determine disputes regarding the validity of a decedent's trust to the extent that the trust functions as a will substitute or is otherwise related to the estate. *Perfect Union*

Lodge, 748 S.W.2d at 221 (probate court had jurisdiction over decedent's trust governing the disposition of his assets).[22]

Probate courts are also typically responsible for resolving competing claims, entitlements, and issues concerning the disposition of the decedent's property that are intertwined with determining the validity of the decedent's estate plan. These include claims seeking to establish that the decedent intended to dispose of his or her assets other than as provided in an estate plan, or otherwise invalidate the plan on grounds of undue influence, fraud, duress, or other tortious conduct, as well as claims that depend for their existence on the validity of competing estate-planning instruments. A probate court's exclusive jurisdiction to determine the validity of an estate plan would hardly be exclusive if some other court had concurrent jurisdiction to resolve these kinds of controversies because they are precisely the kinds of matters that the probate court must consider and resolve in upholding or overturning a contested estate plan for the benefit of all interested parties. Accordingly, in Texas, a probate court has exclusive jurisdiction over all such claims and issues. TPCA §§ 5(c) & 5A; *Perfect Union Lodge*, 748 S.W.2d at 221; *Cobb*, 593

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[22] In general, Texas probate courts have concurrent jurisdiction with state district courts over "all actions involving an *inter vivos* trust." TPCA §§ 5(d), 5A(c)(2). However, "[i]n situations where the jurisdiction of a statutory probate court is concurrent with that of a [state] district court, any cause of action appertaining to estates or incident to an estate shall be brought in a statutory probate court rather than in the district court." TPCA § 5A(b). Under Texas law, a matter "appertains" or is "incident" to an estate if it involves a matter "relating to the settlement, partition, and distribution of estates of deceased persons," including all "claims" to the decedent's assets. TPCA § 5A(a); *Bailey*, 862 S.W.2d at 585. These concepts are construed broadly: "An action is 'incident or appertaining' to an estate when the outcome will have a direct bearing on the assimilation, collection, and distribution of the decedent's estate." *Falderbaum v. Lowe*, 964 S.W.2d 744, 747 (Tex. App. 1998). Thus, any matter involving an *inter vivos* trust that is also "incident" or that "appertains" to an estate lies within the probate court's exclusive jurisdiction. TPCA § 5(c) (all applications, petitions and motions regarding "probate" must be filed and heard in a probate court); *Perfect Union Lodge*, 748 S.W.2d at 221.

S.W.2d at 676; *Pullen v. Swanson*, 667 S.W.2d 359, 361-63 (Tex. App. 1984); *see also Bailey*, 862 S.W.2d at 585-86; *In re Graham*, 971 S.W.2d 56, 59 (Tex. 1998) (guardianship); *see also Sutton*, 246 U.S. at 208.

Protecting Exclusivity and Finality. State probate law typically prescribes rules and procedures to protect and enforce the exclusivity and finality of probate jurisdiction and judgments. Exclusive jurisdiction would ill serve the probate system if other courts were free to disregard the judgment of the probate court, or had jurisdiction to entertain a collateral attack on that judgment. Accordingly, like probate judgments in other states, Texas probate judgments are binding against the world unless set aside in the manner provided by Texas law. *Mooney v. Harlin*, 622 S.W.2d 83, 85 (Tex. 1981); *Ladehoff v. Ladehoff*, 436 S.W.2d 334, 336-37 (Tex. 1968); *see also Broderick's Will*, 88 U.S. at 514-15 ("[I]n the United States, wherever the power to probate a will is given to a probate or surrogate's court the decree of such court is final and conclusive, and not subject, except on an appeal to a higher court, to be questioned in any other court, or be set aside or vacated by the court of chancery on any ground.").

Under Texas law, attempts to set aside the judgment of a probate court other than by ordinary appeal are strictly limited in time and procedure. TPCA § 31 (any bill of review must be filed with probate court within two years of judgment); TPCA § 93 (any will contest must be made within two years of probate). Moreover, such claims must be brought in the court that issued the original probate judgment, and are in the nature of a continuation of the original probate proceeding. *Estate of Devitt*, 758 S.W.2d 601, 604 (Tex. App. 1988); *Crawford v. Williams*, 797 S.W.2d 184, 186 (Tex. App. 1990) (will contest must be brought before original probating court); *Hardin v. Hardin*, 66 S.W.2d 362, 364 (Tex. App. 1933) (same). Correspondingly, Texas courts other than the probate court lack jurisdiction to entertain claims based, for example, upon the validity of some instrument other than a validated estate plan. *Messer v. Carnes*, 71 S.W.2d 580, 582 (Tex. App. 1934) (Texas district court had no jurisdiction over claim for property based on claim of invalid will where probate court had determined probated will to be valid). Moreover, in order to protect their jurisdiction, Texas probate courts have the power to transfer any Texas case falling within their exclusive jurisdiction to

their own dockets. TPCA § 5B; *In re Ramsey*, 28 S.W.3d 58, 63-64 (Tex. App. 2000).

Consistent with these limitations, once a probate court has validated an estate plan, Texas law recognizes that all tort claims based on expectancies of inheritance contrary to the plan are foreclosed. *Thompson v. Deloitte & Touche*, 902 S.W.2d 13, 16 (Tex. App. 1995) (probate judgment establishing validity of decedent's intended scheme of distribution precludes tortious interference claim based on expectancy of a different distribution); *Neill v. Yett*, 746 S.W.2d 32, 35 (Tex. App. 1988) (same). Likewise, except as Texas law expressly allows (e.g., in situations not relevant here involving incapacitated persons or those who did not receive adequate notice), Texas law does not permit disappointed beneficiaries to proceed directly against other beneficiaries to recover their alleged entitlements, but vests the probate court with exclusive jurisdiction to determine "all actions for trial of the right of property" related to the disposition of the decedent's assets. TPCA § 5A(b).

One of the key functions of any probate proceeding is to clear title to the decedent's assets otherwise clouded by disputes over its proper ownership. *Simmons v. Saul*, 138 U.S. 439, 455-56 (1891) ("[A] judgment, decree, sentence, or order passed by a competent jurisdiction, which creates or changes a title or any interest in an estate, is not only final as to the parties themselves and all claiming under them, but furnishes conclusive evidence to all mankind that the right or interest belongs to the party to whom the court adjudged it."); *Langbein* at 1117. In this case, the Probate Judgment effectuated this very purpose, holding that Pierce is entitled to his inheritance free of any competing claim, including any claim by Vickie. JA 125-26.

B. Federal Courts Lack Jurisdiction To Interfere With State Probate Proceedings.

This Court has recognized that, if federal courts could exercise unlimited concurrent jurisdiction over probate matters, "the conflict of jurisdictions would be irreconcilable and disastrous." *Bank of Tennessee v. Vaiden*, 59 U.S. 503, 507 (1855). In view of the importance of a final and unitary determination of the controversies arising in probate, this Court has firmly established that federal courts, including bankruptcy courts, lack subject matter jurisdiction to undertake core probate functions

or to interfere with the state court's exercise of its probate powers. *E.g.*, *Harris*, 317 U.S. at 450; *Sutton*, 246 U.S. at 205; *O'Brien*, 199 U.S. at 114-16; *Byers*, 149 U.S. at 619; *Broderick's Will*, 88 U.S. at 515-20; *Armstrong v. Lear*, 25 U.S. 169, 175-76 (1827). Like the related "domestic relations exception," the probate exception is best conceived as a presumption of statutory construction that, when Congress creates a font of federal jurisdiction, it does not thereby intend for federal courts exercising that jurisdiction to interfere with probate matters unless Congress' intent to interfere is clearly and specifically expressed. *Ankenbrandt v. Richards*, 504 U.S. 689, 700 (1992) (explaining that when Congress amends a jurisdictional provision "we presume Congress [made the amendment] with full cognizance of the Court's nearly century-long interpretation of the prior statutes, which had construed the statutory . . . jurisdiction to contain an exception for certain domestic relations matters"). The probate exception doctrine has existed and evolved for nearly two hundred years, and there is no basis for rejecting it now or for declining to apply it to Vickie's claim in this case.

1. There is no basis for abandoning the probate exception that Congress has not seen fit to displace.

Vickie urges as an initial matter that this Court should abandon the probate exception altogether as an anachronism. Pet. Br. 28-29. That argument is misplaced. While Congress' long acceptance of the exception is, in itself, reason enough to retain it, *see Ankenbrandt*, 504 U.S. at 700, the doctrine's continued vitality arises principally from the essential practical function it serves. As this Court explained more than 100 years ago, "[w]hatever may have been the original ground of this rule (perhaps something in the peculiar constitution of the English courts), the most satisfactory ground for its continued prevalence" is the probate court's need to conclusively settle the validity of an estate plan:

> The public interest requires that the estates of deceased persons, being deprived of a master, and subject to all manner of claims, should at once devolve to a new and competent ownership; and, consequently, that there should be some convenient jurisdiction and mode of proceeding by which this devolution may be effected with least chance

> of injustice and fraud; and that the result attained should be firm and perpetual.

Broderick's Will, 88 U.S. at 509-10. The probate exception has endured precisely because the jurisdictional exclusivity that it promotes is critical to the sound administration of proceedings in probate.

This case illustrates the vital need for the probate exception and the severe consequences that follow when it is not respected by a federal court. Vickie's attempts to litigate her probate-based state law claims in both state and federal court instigated an unseemly open conflict between the two court systems, leading each court to enjoin the parties from proceeding in the other.[23] The conflict arose because, despite her artful pleading, Vickie's federal claims sought a federal resolution of the same probate claims pending before the Texas Probate Court. Had she succeeded, the efforts of the Texas Probate Court to establish the validity of the Estate Plan and J. Howard's true intentions would have been rendered a nullity. In the absence of the probate exception, the authority to decide a claim like Vickie's would fall to the court that could decide the question fastest, rather than to the court with the specialized expertise in state probate law. In the process, the State's interest in administering probate proceedings, including the special need for reconciling the competing claims of numerous parties relating to the validity of the decedent's estate plan, would be frustrated.

The need to retain control of probate issues in probate court is further illustrated by the District Court's recognition that it was unclear whether state courts would even recognize Vickie's novel state law claim of "tortious interference" with an "expectancy of a gift." PA 130; *see also Ankenbrandt*, 504 U.S. at 703-04 (concluding that the related "domestic relations" exception is justified on ground that "state courts are more eminently suited to work of this type than are federal courts," in part, because of the state courts' "judicial expertise" in a specialized area of state law). The fact that no Texas court has ever recognized Vickie's alleged cause of action illustrates vividly how the federal adjudication of

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[23] *See* note 9 *supra* (discussing injunctions).

probate matters can stray dangerously beyond the borders of established probate administration. Federal courts should not be engaged in adjudicating novel probate causes of action that disrupt or supplant the administration of probate proceedings because doing so quintessentially robs the States of their prerogative over the design of state probate systems. Yet, inevitably, that is what federal courts will be asked to do in cases of this kind unless the probate exception applies.

The probate exception has also long served to prevent the kind of forum shopping exhibited in this case. Indeed, as this case demonstrates, disregard for the probate exception encourages those disappointed by a state probate decision to seek a remedy in federal court, rather than through appellate review in the state with the possibility of eventual review by this Court. Vickie's insistence in this case that her claims are not barred by the preclusive effects of the Probate Judgment, *see* Pet. Br. 42 n.30, demonstrate that the possible defenses of *res judicata* and collateral estoppel will be insufficient to stem the tide of disappointed beneficiaries into federal court, particularly when the financial and emotional stakes are high. Even if ultimately unsuccessful, such collateral litigation on probate issues imposes enormous costs on the parties and the federal courts; can delay final resolution of the decedent's last wishes for years; and introduces harmful uncertainty into estate planning.

Because the probate exception serves such manifestly important purposes, the lower federal courts have repeatedly invoked or cited the doctrine in literally hundreds of decisions. *See* Allan D. Vestal & David L. Foster, *Implied Limitations of the Diversity Jurisdiction of Federal Courts*, 41 MINN. L. REV. 1, 13 (1956-1957) ("[O]ne of the most widely stated generalizations in the area of federal jurisdiction is that federal courts can exercise no probate jurisdiction. Statements have been made to that effect in approximately 250 reported federal cases."). Because of its critical importance, the Court should reject Vickie's invitation to abandon the probate exception in this case, but, rather, should apply it to bar federal adjudication of her claim.

2. The scope of the probate exception.

Although the precise boundaries of impermissible interference with probate matters have never been defined conclusively, the Court's precedents establish that interference

exists, and that a federal court lacks jurisdiction over a claim otherwise within its jurisdiction, if the adjudication of the claim would require the federal court to do any one of the following: (1) exercise the core probate functions of a probate court, such as administering an estate or determining the validity of an estate planning instrument; (2) disregard or set aside a probate court's probate judgment; or (3) resolve critical questions of law or fact that, in the performance of its core probate functions, a probate court must decide.

Exercise of Probate Powers. This Court's earliest cases establish that a federal court may not undertake to exercise the core functions of a probate court. Thus, in *Armstrong v. Lear*, 25 U.S. 169 (1827), this Court held that a plaintiff may not directly or indirectly establish in federal court the validity of a will. There, the plaintiff brought suit in federal court to establish, on the basis of an instrument purporting to grant him a bequest, the "right of the plaintiff to receive payment out of the assets of the testator." 25 U.S. at 175. The Court held that the claim of payment depended on the validity of the purported will and that no will can be effective until "admitted to probate." *Id.* Accordingly, the Court held, "it is indispensable to the plaintiff's title, to procure, in the first instance, a regular probate of this testamentary paper" in the relevant state probate court and, therefore, the claim could not proceed in federal court. *Id.* at 176.

This Court has since repeatedly reaffirmed that a federal court lacks the power to probate a will or to proceed on a claim that requires the federal court to determine the validity of a will not yet subject to probate. *E.g.*, *O'Callaghan v. O'Brien*, 199 U.S. 89, 110 (1905) ("[A]s the authority to make wills is derived from the state, and the requirement of probate is but a regulation to make a will effective, matters of pure probate, in the strict sense of the words, are not within the jurisdiction of courts of the United States."); *Gaines v. Chew*, 43 U.S. 619 (1844) (federal court lacked jurisdiction to hear claim against defendants alleged to have "fraudulently concealed, suppressed, or destroyed" a will because claim depended on the validity of the allegedly suppressed will which had never been probated).

Nor may a federal court undertake to directly exercise any of the other core powers of a probate court, including, for example, administration of the estate, *Markham*, 326 U.S. at 494, or

direction of the distribution of the assets of the estate among competing creditors, *e.g.*, *Waterman v. Canal-Louisiana Bank & Tr. Co.*, 215 U.S. 33, 44-46 (1909), or otherwise exercise control over the property in the probate estate, *see Byers*, 149 U.S. at 614.

Not every activity undertaken by a probate court is, of course, necessarily a core probate function beyond the competence of any other court or sheltered under the probate exception doctrine. This Court has long recognized, for example, that establishing a debt owed by the decedent is not generally a core function of the probate court protected by the doctrine and, consequently, may be undertaken by other state courts of general jurisdiction and by the federal courts with appropriate jurisdiction. *See Markham*, 326 U.S. at 494; *Byers*, 149 U.S. at 615; *Hess* v. *Reynolds*, 113 U.S. 73, 75-79 (1885); *Green's Administratrix v. Creighton*, 64 U.S. 90, 107-08 (1859); *see also Ingersoll v. Coram*, 211 U.S. 335, 360 (1908) (federal court may establish lien against beneficiary's share of estate); *Hagan v. Walker*, 55 U.S. 29, 33-34 (1852) (creditor may maintain a bill for the discovery of the assets of his deceased debtor). Likewise, once the validity of an estate plan has been established by a probate court, a federal court may interpret the will to establish the right of "'legatees and heirs' and other claimants against a decedent's estate to 'establish their claims' *so long as the federal court does not interfere with the probate proceedings*." *Markham*, 326 U.S. at 494 (emphasis added).

But each of these examples define narrowly tailored instances in which interference with core probate functions would not, in fact, occur. Moreover, as the Court has explained, the "occasional departures from the rule are always carefully placed on such special grounds that they tend rather to establish than to weaken its force." *Broderick's Will*, 88 U.S. at 510. As shown below, the adjudication of Vickie's claim in federal court clearly interferes with the essential functions of the Probate Court, the probate exception applies, and federal jurisdiction is lacking.

Disregard of Probate Judgments. Just as a federal court may not undertake to perform a probate court's core functions itself, it also may not disregard or revisit determinations made by a probate court in the exercise of its protected jurisdiction. Thus, for example, when a state probate court has probated a will, a federal court may not entertain a claim to set the probate aside, even on the

ground that the probated document was a fraud, or that the probate judgment itself was obtained by fraud. *See Tarver v. Tarver*, 34 U.S. 174, 180 (1835) ("And the bill cannot be sustained on the allegation that the probate is void. An original bill will not lie for this purpose. If any error was committed in admitting the will to probate, it should have been corrected by appeal.");[24] *Fouvergne v. New Orleans*, 59 U.S. 470, 473 (1855) (same for probate judgment allegedly obtained by fraud); *see also O'Callaghan*, 199 U.S. at 116 (same).

A federal court must also decline, not only to directly set aside a probate judgment, but also to hear a claim that is inconsistent with the judgment of a probate court. In *Fouvergne*, for example, the federal-court plaintiff claimed to be entitled to a share of the estate of a decedent under the intestacy laws of Louisiana because the will that had been probated by the Louisiana probate court was, in fact, invalid and the probate fraudulently obtained. Because accepting that claim would require the federal court to reject the validity of the probated will, it was barred: "The courts of the United States have no probate jurisdiction, and must receive the sentences of the courts to which the jurisdiction over testamentary matters is committed, as conclusive of the validity and contests of a will; an original bill [in federal court] cannot be sustained upon an allegation that the probate of a will is contrary to law." 59 U.S. at 473. The Court reaffirmed once again that any objection to the probate court's judgment must be the subject of a state court appeal, not a collateral attack in federal court. *Id.*[25]

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[24] Subsequent cases established a limited exception, discussed below, which has no application to this case.

[25] The United States concedes that "[o]nce the state court has established a will through probate . . . if state law requires all contests to that will to be brought in the probate court itself or on appeal from that court, then allowing a subsequent federal suit to annul an already-probated will would directly interfere with the in rem state proceedings." U.S. Br. 15-16. As the government concludes, "unless state law provides for such a collateral challenge by way of an independent suit . . ., a contest to an established will must be brought in the state probate proceedings or on direct appeal therefrom." *Id.*

So too must a federal court decline to entertain or order remedies that, in effect, negate the probate court's judgment. In *Broderick's Will*, the Court found no jurisdiction to entertain an equitable action for fraud because the action could succeed only if the probate judgment were ignored. 88 U.S. at 517. The plaintiffs in that case alleged that the defendants had obtained certain property under a forged will. The plaintiffs prayed for a constructive trust under which the defendants would be required to hold the property they obtained under the will in trust for the plaintiffs (the rightful owners if the will were invalid). *Id.* at 507-08. In rejecting this indirect collateral attack on the probate judgment, the Court explained that the claim of fraud could only prevail if the will was wrongly probated: "On the establishment or non-establishment of the will depended the entire right of the parties; and that was a question entirely and exclusively within the jurisdiction of the Probate court." 88 U.S. at 517. The Court held that, in such circumstances the federal court "will not interfere, for it has no jurisdiction to do so." *Id.*; *see also Ellis v. Davis*, 109 U.S. 485, 494 (1883) (federal court lacked jurisdiction to entertain action to recover property from defendant premised on invalidity of will owing to claim of undue influence because plaintiff had adequate remedy under state probate law).

This rule is subject to an important exception (although not one applicable to this case): Because a central purpose of the probate exception is to permit a State to assign the task of deciding particular probate questions to a single court for uniform and final disposition, the exception does not apply when a State has chosen *not* to make the question the exclusive province of a court exercising probate jurisdiction. Thus, if a plaintiff would be permitted to raise a particular probate-related claim in a state court of general jurisdiction, the plaintiff can raise that claim in federal court, too. *E.g.*, *Sutton*, 246 U.S. at 205; *O'Callaghan*, 199 U.S. at 111-112.

This exception permits federal courts to hear claims challenging probated wills and other probate decisions in some cases. *E.g.*, *Ellis*, 109 U.S. at 496 (holding that, in a State "where, by its law, its own courts of general civil jurisdiction are authorized thus incidentally and collaterally to try and determine the question of the validity of a will and its probate in a suit involving the title to real property, there can be no question that the circuit courts of

the United States might have jurisdiction of such a suit by reason of the citizenship of the parties"); *Gaines v. Fuentes*, 92 U.S. 10, 20-21 (1876) (because Louisiana permitted invalidity of a probated will to be raised as a defense against a claim that the will was a muniment of title); *Gaines v. Relf*, 43 U.S. 619 (1844) (same). In States that, like Texas, require such challenges to be made in the court that probated the will initially, however, federal courts lack jurisdiction to hear the contest. *See Sutton*, 246 U.S. at 207; *O'Callaghan*, 199 U.S. at 115-16. As discussed below, because Vickie's claim falls within the latter category of cases, it is barred.

Deciding Questions Falling Within the Probate Court's Core Jurisdiction. A federal court impermissibly interferes with a probate court's exercise of jurisdiction over its core functions, not only by directly setting aside or ignoring the probate court's judgment, but also by deciding questions that effectively usurp the probate court's functions or may bar the probate court from making an independent determination on the factual and legal questions that are at the core of its probate responsibilities.

For example, if a federal court were to decide that a bequest is valid based upon a particular instrument, and issue its judgment before the completion of the probate of a second superseding instrument not presented in the federal case (perhaps because the party holding the superseding instrument was unaware of the federal case), the federal court could thwart the effectiveness of the superseding instrument by ordering payment of the bequest under the first instrument.[26] To prevent the piecemeal adjudication of what are essentially probate issues, this Court's cases, such as *Armstrong*, *Tarver*, *O'Callaghan*, *Broderick's Will*, and *Sutton*, proscribe federal jurisdiction over matters presented in actions superficially labeled as unrelated to probate, but that require as part of their adjudication the resolution of essential probate issues.

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[26] The federal decision might also lead to the odd and untenable consequence that the probate court would be required to accept the validity of the first instrument, insofar as it applied to the parties before the federal court, but nonetheless could hold that the superceding instrument was valid with respect to all others (since those not parties or privies to the federal judgment would not be bound by any preclusive effect of the federal judgment).

E.g., *Sutton*, 246 U.S. at 208 (recognizing that the suit "in an essential feature" involved the invalidity of the decedent's will, the Court observed that, under Texas law, disputes of this kind were assigned for resolution in Texas courts exercising probate jurisdiction as "merely supplemental to the proceedings for probate of the will and cognizable only by the probate court"). As discussed below, because Vickie's alleged cause of action for "tortious interference" with an "expectancy of a gift" falls within this category, it is also barred.

C. The Probate Exception Extends To Vickie's Tortious Interference Claim.

1. The adjudication of Vickie's claim in federal court caused a foreseeable and irreconcilable conflict of jurisdictions and judgments.

The federal adjudication of Vickie's claim for "tortious interference" with an "expectancy of a gift" strikes at the very heart of the Probate Court's core responsibilities and exclusive jurisdiction – determining how J. Howard intended to dispose of his assets and whether his Estate Plan was tainted by misconduct. Because of this necessary overlap, it was entirely foreseeable that the assertion of federal jurisdiction over Vickie's tort claim could lead to directly conflicting findings of fact and law between the state and federal courts concerning fundamental and essential probate issues that the Probate Court was required to decide in exercising its exclusive probate jurisdiction to fulfill its core probate responsibilities.

In this case, the Probate Court properly determined that it had exclusive jurisdiction under Texas law to determine the validity of the Trust. JA 116. Here, the Trust operated in tandem with the Will, and the Trust, rather than the Will, was J. Howard's principal vehicle for disposing of his assets upon his death. In addition, the whole point of Vickie's challenge to the Trust was to defeat the Trust on the ground that it was contrary to J. Howard's intent and tainted by misconduct so that all of the property in the Trust would then be part of J. Howard's estate free of the terms of the Trust. Vickie's theory was that, once the Trust was defeated, she could then claim a share of the assets under the Texas succession laws. ER 2870-72. Vickie's challenge to the Trust was thus "incident" or "appertaining" to J. Howard's estate within the meaning of the Texas Probate Code, not only because the Trust

operated in tandem with the Will, but also because Vickie's challenge *necessarily* related to "the settlement, partition, and distribution of estates of deceased persons." TPCA § 5A(a).

The Probate Court also properly determined that it had exclusive jurisdiction under Texas law over Vickie's claims, including any claim regarding "the making of any *inter vivos* or testamentary gift or transfer by [J. Howard] of any of his property," and "all affirmative claims and all filed and possible compulsory counterclaims raised by [Vickie]" (which "filed" claims include the tortious interference claim that she filed against Pierce in the Probate Case). JA 116. The Probate Court *necessarily* had exclusive jurisdiction under Texas law over Vickie's claim that J. Howard intended to give her a gift worth tens of millions of dollars from assets contained in his Estate Plan; her various other challenges to the Estate Plan based on any alleged misconduct; and her specific claim for "tortious interference" with an "expectancy of a gift" based on the same allegations. This is so because all of these claims involved key issues that the Probate Court had to decide in order to determine J. Howard's true intentions; validate his Estate Plan as untainted by misconduct; and resolve competing claims to the same property. *E.g.*, *Perfect Union Lodge*, 748 S.W.2d at 220 (stating that the purpose of the construction of a will or trust is to determine the decedent's intent and that "[t]he court shall effectuate that intent as far as legally possible"); *Rothermel v. Duncan*, 369 S.W.2d 917, 922 (Tex. 1963) ("Undue influence in the procurement of a testament is a ground for its avoidance.").

Moreover, as this Court has made plain, a state court's construction of its own jurisdiction is binding, and may not be disturbed collaterally, in federal court. *Underwriters Nat'l Assurance Co. v. N.C. Life & Accident Health Ins. Guar. Ass'n*, 455 U.S. 691, 706-07 (1982); *Durfee v. Duke*, 375 U.S. 106, 116 (1963). Thus, although the Probate Court's construction of its jurisdiction under Texas law may not preclude a federal court from determining its own jurisdiction under federal law, it does conclusively establish the scope of the Probate Court's jurisdiction in this case.

The District Court's adjudication of Vickie's tortious interference claim necessarily tread upon this traditional, exclusive area of state probate jurisdiction and expertise. To begin with, Vickie contends that J. Howard intended to give her a gift in the

form of a "catch-all trust." It is undisputed, however, that, during the course of his entire relationship with Vickie, J. Howard kept *all* of his assets in his actual Trust. Thus, the assets in the Trust constitute the *only* source of the gift that Vickie claims. It is also undisputed that J. Howard never created a separate "catch-all trust" as a gift for Vickie, and that the Trust that J. Howard actually established provides that *all* of J. Howard's property is to be distributed to persons other than Vickie. Thus, the Trust and the alleged catch-all trust involve the same property, and only one of them can accurately reflect J. Howard's true intent.

As a matter of Texas law, either J. Howard intended his assets to be distributed as provided under the Trust (which the Probate Court determined), or he intended some other disposition, including a distribution to Vickie (which the Probate Court expressly rejected, but the District Court accepted). One *necessarily* precludes the other where, as here, Texas has prescribed a comprehensive procedure for resolving finally, and in a single forum, *all* competing theories regarding the decedent's intended disposition of the same assets. *Thompson*, 902 S.W.2d at 16 (probate judgment establishing validity of decedent's intended scheme of distribution precludes tortious interference claim based on expectancy of a different distribution); *Neill*, 746 S.W.2d at 35 (same). Likewise, except as Texas law expressly allows (e.g., in situations not relevant here involving incapacitated persons or those who did not receive adequate notice), it is inescapable that the District Court's acceptance of Vickie's theory regarding J. Howard's intent negated the Probate Court's contrary finding and, thus, interfered with its essential probate function of finally resolving the issue in the course of validating J. Howard's Estate Plan.

In addition to basing her claim on J. Howard's alleged intent to create a gift for her, Vickie contends that Pierce thwarted J. Howard's intent (i.e., tortiously interfered with it) by manipulating the Estate Plan. Specifically, she alleges that Pierce, by forgery, duress, fraud, and undue influence, prevented any of the assets in the Trust from being used to fund her alleged catch-all trust. Plainly, if the Trust is perfectly valid and untainted by any misconduct, then Vickie's claim must fail because, not only does the validity of the Trust establish conclusively that J. Howard intended to distribute all of his assets to persons other than Vickie

(rebutting the contrary theory underlying her claim), it likewise demonstrates conclusively that the manipulation she alleges did not occur.

Under Texas law, the Trust cannot be perfectly valid and untainted by misconduct (as the Probate Court expressly found), and at the same time be invalid and the object of rampant forgery, manipulation, duress, and fraud (which the Probate Court rejected, but the District Court accepted). Again, one determination necessarily precludes the other where, as here, Texas has prescribed a comprehensive procedure for resolving finally, and in a single forum, all claims of misconduct surrounding a decedent's Estate Plan. It is again inescapable that the District Court's acceptance of Vickie's allegations of wrongdoing negated the Probate Court's contrary findings and, thus, interfered with its essential probate function of finally resolving the issue in the course of validating J. Howard's Will and Trust.

As the Ninth Circuit correctly recognized, the District Court awarded Vickie damages based on what it believed she would have received if J. Howard had actually effectuated the gift that she claims. PA 32. This award plainly negated through the imposition of damages, not only the Probate Court's rejection of Vickie's gift theory and various challenges to the Estate Plan, but also the Probate Court's express determination that Pierce is entitled to his inheritance free and clear of any claim by Vickie.

2. Vickie's claims are barred by the probate exception.

The federal adjudication of Vickie's claim for "tortious interference" with an "expectancy of a gift" causes all three types of impermissible interference under this Court's probate exception doctrine.

Exercise of Probate Powers. In order to rule in Vickie's favor on her claim, the District Court was required to determine that Vickie had a legitimate expectancy of a gift on the theory that J. Howard intended to establish the catch-all trust that she claims.[27]

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[27] Indeed, as Vickie argued below, the existence of this catch-all trust is "central" to her claim. JA 243.

In other words, the District Court necessarily had to determine that J. Howard intended to create an instrument disposing of a portion of his assets in competition with (and in contravention of) the terms of the Trust. But the power to declare the validity of such a competing instrument, together with any entitlement arising from it, belonged exclusively to the Probate Court. Accordingly, the District Court inescapably interfered with the Probate Court's prerogative and the federal adjudication of Vickie's claim runs afoul of this Court's probate exception doctrine as applied in such cases as *Armstrong* and *O'Callaghan*.

Disregard of Probate Judgments. In order to rule in Vickie's favor, the District Court also was required to exercise the Probate Court's exclusive power to set aside its prior Probate Judgment, and otherwise disregard the prior judgment. Under Texas law, no court other than the probate court that determined the validity of an estate plan may entertain an action that conflicts with a prior probate judgment. *See Estate of Devitt*, 758 S.W.2d at 604; *Crawford*, 797 S.W.2d at 186 (will contest must be brought before original probating court); *Messer*, 71 S.W.2d at 582 (Texas state district court had no jurisdiction over claim for property based on claim of invalid will where probate court had determined probated will to be valid); *Hardin*, 66 S.W.2d at 364. Moreover, although no Texas court has ever recognized a cause of action for tortious interference with the expectancy of a gift, Texas courts have determined that, in the context of alleged claims for tortious interference with inheritance rights, such claims are barred by the successful probate of a will that contradicts the plaintiff's expectancy. *See Thompson*, 902 S.W.2d at 16; *Neill*, 746 S.W.2d at 35.

The preclusion of tortious interference claims that conflict with the result of a completed probate proceeding is a prudent and important measure designed to ensure that the tort does not become an instrument for undermining probate jurisdiction. In particular, requiring a tortious interference plaintiff to return to the probate court in order to first set aside a previously validated Estate Plan instrument protects against the radically inconsistent judgments obtained in the competing forums in this case. *See generally Jackson v. Kelly*, 44 S.W.3d 328, 332-33 (Ark. 2001).

Because a federal court could not provide Vickie any relief on her tort claim without first setting aside the Probate Judgment,

Vickie's claim is barred as long as the Probate Judgment validating the Trust stands.[28] This Court has repeatedly held that such claims fall within the probate exception. *E.g.*, *Ellis*, 109 U.S. at 494; *Broderick's Will*, 88 U.S. at 517; *Fouvergne*, 59 U.S. at 471-73. As these cases teach, if the Probate Court erred in concluding that the Will and Trust were valid, then Vickie's sole "remedy is in the state courts, according to their appropriate modes of proceeding." *Fouvergne*, 59 U.S. at 473.[29]

Vickie's adjudication of her claim in federal court is barred for the additional reason that the Probate Judgment expressly quiets title to J. Howard's assets in Pierce free and clear of any claim by Vickie. JA 125-26. This Court long ago concluded that

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[28] For this reason, it makes no difference that Vickie does not specifically ask the federal court to set aside the Trust or declare it invalid. *See* Pet. Br. 14 & n.12. It is enough that her claim can only succeed as a matter of law on the theory that the Trust is, in fact, invalid.

[29] Vickie suggests that the Bankruptcy Court's judgment was the first final order in this case and that, therefore, it was binding on the Probate Court. Pet. Br. 42 n. 30. By the time the Probate Court entered its judgment, however, the purported bankruptcy judgment in Vickie's favor had been vacated and, therefore, was not entitled to any preclusive effect. PA 22; *see* RESTATEMENT 2D JUDGMENTS § 16 (vacated judgments not entitled to preclusive effect); *cf.* FED. R. CIV. P. 60(b)(5) (judgment based on preclusive effect of prior decision that has since been vacated may be set aside). Contrary to Vickie's suggestion, the Probate Court was not required to immediately enter judgment in Vickie's favor in light of the questionable Bankruptcy Court judgment. *See* RESTATEMENT, *supra*, § 16 cmt. b (When "the actions are being maintained in different jurisdictions, or there is not an identity of claims but rather an identity of issues, it may still be advisable for the court that is being asked to apply the judgment as *res judicata* to stay its own proceedings to await the ultimate disposition of the judgment in the trial court or on appeal. This course commends itself if the disposition will not be long delayed and especially if there is substantial doubt whether the judgment will be upheld."). In any case, Vickie never established in the Probate Court that it was required to give preclusive effect to the vacated Bankruptcy Court judgment. *See Arizona* v. *California*, 530 U.S. 392, 410 (2000) (preclusion is an affirmative defense "ordinarily lost if not timely raised"); *Russell v. Ingersoll-Rand Co.*, 841 S.W.2d 343, 349 n.9 (Tex. 1992) (same); *cf.* FED. R. CIV. P. 8(c) (same); TEX. R. CIV. P. 94 (same).

determinations of this kind are also not subject to collateral attack in federal court, and must be respected as binding against the world. *See Simmons*, 138 U.S. at 455-56. Accordingly, Vickie's claim fails for this reason too, unless and until the Probate Judgment is set aside.

Deciding Questions Falling Within Probate Court's Core Jurisdiction. It is equally clear that Vickie's claim required the federal court to adjudicate facts and legal questions that must be, and in fact were, established by the Probate Court in the exercise of its core probate functions.[30] These include the findings that J. Howard did not intend to give Vickie a gift and that his Estate Plan is untainted by misconduct. Given the interconnected nature of these findings and the Probate Court's duties, it is not surprising that the Probate Court held that Vickie's tortious interference claim is a compulsory claim under state law that she was required to assert in the Probate Case, to which she was a party. JA 129.[31] Federal jurisdiction over Vickie's claim is, accordingly, barred.

3. Vickie's attempts to remove her claims from the scope of the probate exception fail.

Vickie attempts to extricate her suit from the probate exception by pointing to various features of her tort claim that, she says, distinguish it from claims falling within this Court's established doctrine. Those attempts fail.

Vickie argues first that the probate exception does not apply to her suit because it "is against Pierce individually, not against Howard's estate." Pet. Br. 14. She contends that such a suit is "*inter partes*," and, therefore, outside the scope of the probate exception, *id.* at 16-18, and that federal courts have long exercised

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[30] Thus, even if the Probate Court had not won the race to judgment, the federal court nonetheless would have been precluded from resolving Vickie's claim because doing so would interfere with the Probate Court's core duties.

[31] Vickie argues (Pet. Br. 42 n.30) that the Texas Probate Court misinterpreted the Texas Rules of Civil Procedure on this question. That would be surprising indeed. In any event, for the same reasons that the federal courts had no authority to revisit the Probate Court's determination of its jurisdiction, they had no authority to second-guess the Probate Court's interpretation of its own procedural rules.

jurisdiction to annul previously probated wills and otherwise disregard probate judgments so long as the suit arose between two or more particular parties, *id.* at 13, 17, 21. Vickie is mistaken.

As noted, this Court has held that federal courts may not exercise *in rem* jurisdiction over the probate estate itself, *e.g.*, *Byers*, 149 U.S. at 614, and that *some* suits between individuals fall outside the probate exception (particularly when state law permits such a suit to be brought outside of probate court), *see supra* 27 (collecting cases). The Court has also made clear, however, that the probate exception *does* apply to some suits between individuals and that Vickie's suit is one of them. For example, in *Broderick's Will*, this Court held the probate exception to apply to an indistinguishable circumstance in which plaintiff pursued an *inter partes* suit, seeking a constructive trust to be imposed on individuals who obtained property as a result of the allegedly fraudulent will. 88 U.S. at 517. Because that suit, like this one, could succeed only by disregarding a prior probate judgment validating an estate plan, the federal court had no jurisdiction to hear it. *Id.*[32]

Vickie also suggests that this Court's decision in *Markham v. Allen* authorizes her suit. Pet. Br. 24-25. Critically, *Markham* did

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[32] As the Court explained in *O'Callaghan*, although a suit "*inter partes*" may be entertained in federal court, "we must . . . accurately fix the meaning of the words 'action or suit *inter partes*.'" 199 U.S. at 110. As the Court explained further, an action between two individuals is not an action "*inter partes*" if it involves, for example, "mere controversies which may arise on an application to probate a will because the state law provides for notice, or to disputes concerning the setting aside of a probate, when the remedy to set aside afforded by the state law is a mere continuation of the probate proceeding." *Id.* Moreover, in order to determine whether a state law cause of action is one "*inter partes*," it is necessary to determine whether "by custom or the statute law of the state" the action is one that may be heard only in the state probate court, or is otherwise a probate remedy. *Id.* 111-12; *see id.* 114-16 (where a proceeding to contest a will under state law can only be heard before the court that admitted the will to probate, and where the relief in that proceeding operates as against the entire world and not just the parties before the court, it is not an action *inter partes*); *Sutton*, 246 U.S. at 207-08.

not involve federal-court adjudication of either the validity of the decedent's estate plan or questions concerning the decedent's intent. 326 U.S. at 495-96. Instead, the role of the federal court was strictly limited in that case to merely substituting the United States for certain foreign beneficiaries, pursuant to a federal statute, *after* the probate issues had been resolved. Thus, the federal court had no occasion to address any substantive probate matters or otherwise interfere with the probate proceedings in any meaningful way. Moreover, any interference occasioned by the suit would have arisen only because Congress had taken the unusual step of enacting a statute that directly governed the distribution of probate assets and provided a cause of action under that statute for the United States as a party. While Congress obviously contemplated federal jurisdiction over the limited probate-related matters addressed in *Markham*, there is no indication that Congress intended to depart from the settled probate exception in a case such as this one, involving private parties to a state law dispute that unquestionably interferes with core probate functions.

Vickie further argues (Pet. Br. 26-27) that the scope of the probate exception should be "frozen" -- i.e., limited to a hodge-podge of particular holdings in this Court's prior cases, rather than governed by the animating principles that have led courts and Congress to retain the exception. As demonstrated above, even so "frozen," the exception precludes Vickie's suit in this case. But, even if this Court concluded that Vickie's suit did not fall neatly within its prior cases, that would not constitute grounds to refuse to adapt the doctrine in response to the changes in estate planning and probate administration that have been made over the past 150 years. The probate exception cannot serve its vital function if disappointed beneficiaries can, through clever pleading and novel tort theories, evade its essential boundaries.

Finally, contrary to the position taken by the Solicitor General, it is important to note that a proper interpretation of the probate exception has no real significance for the interests of the United States. As the government eventually acknowledges, well-established case law "would preclude application of any such exception to cases in which the United States is a party." U.S. Br. 14. Although the government gives scant attention to this latter point, the case law indeed makes clear that, even when Congress has expressly "divested the federal courts of jurisdiction . . . in a

specified class of cases," and even when, in so doing, Congress "ma[d]e no express exception of the United States" from that general jurisdictional restriction, the jurisdictional restriction will *not* be deemed to apply to the United States. *United States v. United Mine Workers of Am.*, 330 U.S. 258, 270-272 (1947). This Court has clearly held, on several occasions, that if any general restriction on the existing jurisdiction of the federal courts "is intended to reach the Government in the use of known rights and remedies, the language must be clear and specific to that effect." *United States v. Stevenson*, 215 U.S. 190, 197 (1909). *See Dollar Sav. Bank v. United States*, 19 U.S. (19 Wall.) 227, 239 (1873). There are, in short, no implied restrictions on the jurisdiction of the federal courts over claims of the United States: As this Court has held, if such a restriction were intended, Congress would not "omit to use 'clear and specific [language] to that effect' if it actually intended to reach the Government." *United Mine Workers*, 330 U.S. at 273 (quoting *Stevenson*, 215 U.S. at 197). *Accord NLRB v. Nash-Finch Co.*, 404 U.S. 138, 146 (1971); *Leiter Minerals v. United States*, 352 U.S. 220, 225-226 (1957).[33]

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[33] Indeed, in the only case cited by the United States in which it appears that the government has *raised* the point that a general probate exception should *not* apply to the government because there is no "clear and specific" statement of legislative intent to that effect, the court expressly agreed with the government in holding that the probate exception does *not* apply to the government's right to litigate its tax and other claims in federal court. *In re Palmer's Will*, 11 F. Supp. 301, 304 (E.D. Okla. 1935). In the only other cases that the government cites as purportedly having any relevance to this issue (U.S. Br. at 1), the issue either was not addressed by the court at all (*Ashton v. Josephine Bay Paul & C. Michael Paul Found., Inc.*, 918 F.2d 1065, 1067-1068 (2d Cir. 1990)), or the government failed (or for some tactical reason declined) to raise this important jurisdictional point (*Estate of Threefoot*, 316 F. Supp. 2d 636, 642-645 (W.D. Tenn. 2004)). This question whether the United States is subject to the probate exception is, in any event, obviously not presented in this case. The government's tax claims against the Marshall estate were, in fact, addressed and resolved in the federal Tax Court, not in the Probate Court, and those tax claims have no bearing on the dispute involved in this case. The government's hypothetical objections to the possible application of the probate exception to the interests of the United States are thus, not only unsupported by the record, they are squarely

D. The Probate Exception Applies To A Bankruptcy Court's Adjudication Of A State Law Claim "Related To" A Bankruptcy Case.

Vickie also argues that the probate exception does not apply because the federal court's authority to adjudicate her state law claims derives, not from the diversity statute, but from 28 U.S.C. § 1334(b), which gives district courts non-exclusive bankruptcy jurisdiction over "civil proceedings . . . related to cases under title 11."[34] Pet. Br. 29-37. This argument also fails.[35]

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refuted by the actual conduct in the Probate Case. Moreover, the absence of any significant body of authority directly addressing the question whether the United States is subject to the implied probate exception to federal court jurisdiction is not merely accidental. To the contrary, it reflects the established consensus of almost 100 years of practice under the federal estate and income tax laws that the United States may indeed (as Congress has expressly provided) litigate its estate and income tax claims in the federal courts. Accordingly, there is plainly no need for the Court to address the unwarranted, hypothetical and premature concerns raised in the government's brief.

[34] Vickie's suggestion (Pet. Br. 30, 33-34 & n.25) that the federal district court has exclusive jurisdiction over Vickie's claims pursuant to section 1334(e)(1) is patently meritless, for that statute provides only *in rem* jurisdiction over the ordinary property of the bankruptcy estate, which does not include a debtor's causes of action. A contrary conclusion would conflict with numerous other provisions of the Bankruptcy Code, including section 1334(b), which provides that "[e]xcept as provided in subsection (e)(2), . . . the district courts shall have original *but not exclusive* jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." (Emphasis supplied).

[35] Although 28 U.S.C. § 1334 governs the district court's jurisdiction over bankruptcy cases, the jurisdiction of the bankruptcy court is governed by 28 U.S.C. § 157. Here, the Bankruptcy Court plainly lacked jurisdiction to enter a final order regarding Vickie's tort claim and, thus, the District Court properly vacated the Bankruptcy Court's purportedly final judgment. Like all federal courts, bankruptcy courts may exercise only the jurisdiction prescribed by Congress. *Celotex Corp. v. Edwards*, 514 U.S. 300, 307 (1995). Significantly, bankruptcy judges are not Article III judges, and Congress has authorized them to finally resolve only a limited category of matters that are relevant to the performance of their duties in administering bankruptcy estates. 28 U.S.C. § 157(b)(1). Although

This Court has never limited the probate exception to diversity jurisdiction. The Court has considered application of the probate exception in non-diversity settings – in *Markham* (United States a party) and in *Harris v. Zion Sav. Bank & Trust Co.*, 317 U.S. 447 (1943) (bankruptcy) – without even suggesting that the doctrine applies only in diversity cases.

To the contrary, in *Harris* – which Vickie fails even to mention – the Court applied the probate exception to reject the bankruptcy court's assertion of bankruptcy jurisdiction under an express statutory grant. There, the decedent farmer commenced a bankruptcy case before her death. After she died, the bankruptcy court abated her case and the administrator of the decedent's probate estate petitioned to revive her bankruptcy case. The then-applicable Bankruptcy Act plainly gave the bankruptcy court jurisdiction and authorized the personal representative to pursue

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bankruptcy judges may also resolve certain other matters peripheral to their administrative duties that "relate to" a bankruptcy case, they may not enter final orders concerning these matters without the express written consent of all parties (absent in this case), *see* FED. R. BANKR. P. 7012(b), and may issue only recommended findings of fact and conclusions of law subject to *de novo* review by an Article III judge, *see* 28 U.S.C. § 157(c). At best, Vickie claim falls within this latter category. Section 157(b)(1) vests bankruptcy courts with jurisdiction to enter final judgments *only* with respect to (1) "core proceedings" that (2) "arise under title 11" or "arise in a case under title 11." It is not enough that a matter is a "core proceeding." In turn, section 157(c) vests bankruptcy courts with only limited jurisdiction over matters "related to" a bankruptcy case. *Celotex*, 514 U.S. at 307. Vickie's tort claim clearly does not "arise in" or "arise under" the Bankruptcy Code because it exists, if at all, only under state law. *See Eastport Assocs. v. City of Los Angeles (In re Eastport Assocs.)*, 935 F.2d 1071, 1076 (9th Cir. 1991) ("Congress used the phrase 'arising under [the Bankruptcy Code]' to describe those proceedings that involve a cause of action created or determined by a statutory provision of title 11."); *id.* at 1076 (proceedings that "arise in a case under title 11" are "'administrative matters' that arise only in bankruptcy cases," "are not based on any right expressly created by [the Bankruptcy Code]," and "have no existence outside of the bankruptcy.") (quoting *In re Wood*, 825 F.2d 90, 96-97 (5th Cir. 1987)).

the bankruptcy.[36] Applying the principles underlying the probate exception doctrine, this Court nevertheless affirmed dismissal of the petition, explaining that "inconsistencies and difficulties" would arise if bankruptcy were pursued in conflict with the probate court's direction, and that Utah probate law did not authorize resort to bankruptcy court. 317 U.S. at 451-52. The Court reasoned:

> When we reflect that the settlement and distribution of decedents' estates and the right to succeed to the ownership of realty and personalty are peculiarly matters of state law; that the federal courts have no probate jurisdiction and have sedulously refrained, even in diversity cases, from interfering with the operations of state tribunals invested with that jurisdiction, we naturally incline to a construction of . . . [section] 75 consistent with these principles.

Id. at 450. The Court concluded: "The probate court, not the bankruptcy court, is the appropriate forum for weighing the respective benefits or detriments to those who share in the equity of the decedent's estate." *Id.* at 452. Although the United States contends that *Harris* involves simply an exercise in construing the statutory provisions of the former Bankruptcy Act prescribing the jurisdiction of the bankruptcy courts, U.S. Br. 29 n.14, that describes precisely the operation of the probate exception, which presumes that, in vesting federal courts with jurisdiction, Congress does not intend that jurisdiction to interfere with probate matters.

The courts of appeals also have long understood the probate exception to apply in bankruptcy and other federal-question cases. *E.g.*, *Tonti v. Petropoulous*, 656 F.2d 212, 215 (6th Cir. 1981) (no federal-question jurisdiction to hear claim seeking "the same relief

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[36] Section 75c of the Act expressly authorized the deceased farmer's representative to pursue bankruptcy on the decedent's behalf. *Harris*, 317 U.S. at 449. Section 75r defined "farmer" to include "the personal representative of a deceased farmer." *Id.* Section 75n granted the bankruptcy court the same "jurisdiction and powers" as if the farmer had filed bankruptcy. 317 U.S. at 453-54 (Douglas, J., dissenting) (quoting Act). Further, section 8 provided that the death of a bankrupt "shall not abate the proceedings," but that they shall be conducted "as though he had not died." *Id.* at 454.

[that plaintiff] was denied in the Probate Court," that plaintiff's father had intended to give plaintiff an *inter vivos* gift); *Hamburg v. Tri-State Sav. & Loan Ass'n*, 69 F.2d 436, 437-38 (8th Cir. 1934) ("Under that law the probate court is given exclusive, original jurisdiction of matters relative to the administration and of the estates of deceased persons."); *Litzinger v. Litzinger*, 322 B.R. 108 (8th Cir. BAP 2005) (applying probate exception to bankruptcy claim).

Vickie nonetheless insists that, when Congress enacted the predecessor of the bankruptcy jurisdiction provision, 28 U.S.C. § 1334, in 1978, it intended to eliminate the long-standing probate exception from the bankruptcy context. But Congress should not be presumed to have intended to change a longstanding practice – particularly one established, not only in bankruptcy but elsewhere – without saying so. *See Cohen v. De La Cruz*, 523 U.S. 213, 221 (1998) ("We . . . 'will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure.'") (citation omitted); *Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection*, 474 U.S. 494, 501 (1986). Vickie's insistence that Congress nevertheless overrode the probate exception in bankruptcy without saying so fails.

Vickie points out that section 1334 speaks in broad general language that does not expressly incorporate the terms of the probate exception. Pet. Br. 30-31. The same, however, is true of the diversity statute, which speaks in terms no less broad and which, Vickie acknowledges, nonetheless includes the probate and domestic relations exceptions. *Compare* 28 U.S.C. § 1334(b) ("all civil proceedings") *with* 28 U.S.C. § 1332(a) ("all civil actions"). *See* Judiciary Act of 1789, 1 Stat. 78, c. 20 (former diversity statute, giving federal courts jurisdiction of "all suits of a civil nature at common law or in equity" with diverse parties and exceeding jurisdictional amount); *see also Ankenbrandt*, 504 U.S. at 698.[37] The probate exception arises, not from the language of

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[37] In her petition for writ of certiorari and Ninth Circuit brief, Vickie focused on the probate exception's application to federal-question cases. *See* Vickie's Question Presented No.3; Pet. 19-21 & n.8; Appellee's Brief/Cross-Appellant's Opening Brief 68-71. The federal-question

the statutes "but rather on Congress' apparent acceptance of this construction" of federal jurisdictional provisions "in the years prior to" their most recent amendments. *Id.* at 700.

The broad and general language Vickie cites from the sparse legislative history does not support a contrary conclusion. As Vickie acknowledges, section 1334 descends from the former 28 U.S.C. § 1471, enacted as part of the Bankruptcy Reform Act of 1978. Pet. Br. 31 & n.22. In adopting it, Congress relied heavily on the report of the Commission on the Bankruptcy Laws of the United States, created by Congress in 1970 to study and recommend changes to the bankruptcy laws. *See* S. Rep. No. 95-989 at 1-2, *reprinted in* 1978 U.S.C.C.A.N. 5787-88; H.R. Rep. No. 95-595 at 43-48, 49-50, 445-46, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6004-09, 6010-11 (reprinting portion of Commission Report describing problems of current bankruptcy jurisdiction and reasons for expanding jurisdiction, and heavily citing Commission Report to describe effect of what became section 1471).

The Commission informed Congress that "the present [Bankruptcy] Act has been consistently construed as not extending to the initiation of proceedings by representatives of decedents." It pointed out the "tradition of federal deference" to state probate proceedings, and recommended the bankruptcy laws *not* be changed to oust state probate courts of jurisdiction over decedents' estates even if insolvent, stating: "numerous practical problems and questions would arise if the traditional exclusion should be eliminated"; "[i]n light of the tradition of federal deference to state control of administration of decedents' estates and the complications and potential for increased litigation and increased costs arising from any change, substantial need should exist before any extension of federal legislation to cover insolvent decedents' estates is proposed"; and "the Commission recommends that the Bankruptcy Act not be extended to administration of decedents' estates other than to the extent necessary to wind up the

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statute's relevant text mirrors that of the diversity statute. *See* 28 U.S.C. § 1331 ("all civil actions"); Act of March 3, 1875, ch. 137, 18 Stat. 470, § 1 (former federal-question statute, providing jurisdiction over "all suits of a civil nature at common law or in equity").

administration of the estates of debtors who die after the date of the petition." Report of Commission on Bankruptcy Laws of the United States, H.R. Doc. 93-137, pt. 1, at 184-85 (1973) ("Bankruptcy Commission Report").

Taking this recommendation, Congress did not extend bankruptcy jurisdiction to include insolvent decedents' estates. In other words, Congress did not want to interfere with state probate proceedings even when the *probate estate itself* was insolvent and the insolvency would permeate the entire probate. *A fortiori*, Congress did not intend the exercise of bankruptcy jurisdiction to interfere with probate where a single beneficiary was insolvent.[38]

Moreover, Vickie identifies no plausible reason why Congress would have intended to apply the probate exception to the federal adjudication of state law claims by a federal court sitting in diversity, but not to one adjudicating precisely the same claims in a bankruptcy adversary proceeding under section 1334(b). The suggestion is implausible on its face. The interference and conflict that the probate exception operates to prevent can arise just as easily under either font of jurisdiction. *See Harris*, 317 U.S. at 450-52 (discussing potential for "inconsistencies and difficulties" and tension with state law if bankruptcy and probate compete). It is thus impossible to imagine that Congress would determine to maintain the probate exception in diversity cases, yet permit a bankruptcy court to engage in the even most egregious interference with probate proceedings (as, for example, directly probating a will).

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[38] Vickie states that Congress intended bankruptcy proceedings to continue if a debtor dies after filing for bankruptcy. Pet. Br. 35-36. But, unlike a bankruptcy court's intrusion on otherwise plenary state probate proceedings involving a solvent decedent, bankruptcy proceedings involving an already-bankrupt decedent cannot interfere with probate. As Congress noted, the assets affected by bankruptcy could not be probated anyway because the belong to the bankruptcy estate. H.R. Rep. No. 95-595 at 368, *reprinted in* 1978 U.S.C.C.AN. at 6324 ("Once the [bankruptcy] estate is created, no interest in property of the estate remain in the debtor" and only property not included in the estate "will be available to the representative of the debtor's probate estate").

Nor can Vickie point to any special bankruptcy-related purpose that requires that a bankruptcy court, rather than a probate court, adjudicate her claims. Indeed, the lack of such a need is precisely why Congress declined to give bankruptcy court exclusive jurisdiction over such state law claims and why, in this case, the Bankruptcy Court was able to finish the adjudication of Vickie's Bankruptcy Case and grant a general discharge years before it ruled on her tortious interference claim.

Contrary to Vickie's contentions, *see* Pet. Br. 37-39, that Congress allows, and in some cases required, a bankruptcy court to abstain from adjudicating certain state law claims, *see* 28 U.S.C. § 1334(c), undermines, rather than supports, Vickie's position. Congress was legislating against a backdrop of nearly two centuries of cases, starting with *Armstrong*, construing jurisdictional statutes to exclude probate matters. Moreover, this Court had never construed abstention as embracing the probate exception. *Cf. Ankenbrandt*, 504 U.S. at 715 n.8. Accordingly, Congress would have had no reason to think that merely codifying abstention would change this settled law and there is no indication that it intended to do so.

If anything, the abstention provisions demonstrate that Congress did not deem it essential to the operation of the bankruptcy system for a federal court to adjudicate claims like Vickie's tort claim. Further, Vickie cannot reasonably claim that the existence of these abstention provisions demonstrates that Congress intended for conflict with probate courts to be dealt with through abstention, rather than by application of the probate exception to federal jurisdiction. Section 1334(c) extends far beyond the probate context and, accordingly, serves an important purpose, even though it is inapplicable to cases within the probate exception. Furthermore, it would be surprising indeed if Congress intended to preclude federal courts in diversity cases from *ever* exercising jurisdiction over probate matters, but intended to provide bankruptcy courts with unreviewable discretion to decide for themselves whether or not to interfere with the state probate

system. *See* 28 U.S.C. § 1334(d) (decision not to abstain under section 1334(c)(1) is not appealable).[39]

Moreover, abstention cannot fully protect the interests served by the probate exception. Vickie notes (Pet. Br. 37) that, under section 1334(c)(2), the federal court is *required* to abstain if the state law claim is "related to a case under title 11," there is no other source of federal jurisdiction, and the claim "can be timely adjudicated . . . in a State forum of appropriate jurisdiction" and that decision is subject to review, *see* 28 U.S.C. § 1334(d). Vickie is careful, however, not to assert that this provision applies to all cases that would otherwise be subject to the probate exception, as she opposed Pierce's motion for abstention under this provision in the District Court. Moreover, by its terms, section 1334(c)(2) would not authorize abstention if no probate proceedings had been initiated, and would not apply to a case in which the debtor sought to disregard or set aside an already-completed probate judgment. Thus, unlike the probate exception, even mandatory abstention would not stop disappointed heirs from bringing probate proceedings and will contests in bankruptcy court in the first instance, or questioning the decedent's intent or testamentary instruments in bankruptcy court after the probate court had already upheld them.

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[39] Vickie misstates the holdings of cases relied upon in her abstention argument. For example, in *Salisbury v. Ameritrust Tex., N.A. (In re Bishop College)*, 151 B.R. 394 (Bankr. N.D. Tex. 1993), the bankruptcy court did *not* exercise its "discretion" to abstain under section 1334(c) when it declined to review a probate matter, but rather determined that the charitable trust at issue was not included within the bankruptcy estate. Although, in *Carter v. Lummis (In re Tom Carter Enters.)*, 44 B.R. 605 (C.D. Cal. 1984), the district court denied an abstention motion, it did *not* do so not "based on" the Nevada probate proceedings. Instead, the ruling was based on the bankruptcy interest involved in determining whether the debtor's agreement to purchase property from a Nevada estate created rights to Nevada property properly included within the bankruptcy estate. The remaining cases cited by Vickie concern bankruptcy adjudication of domestic relations matters. As noted, *Ankenbrandt* rejected the argument that domestic relations should be addressed as matter of abstention, holding instead that these issues are outside the jurisdiction of the federal courts. 504 U.S. 689, 706 n.8.

Finally, section 1334(c)(2) applies only if a party requests abstention, and only then if the federal court considers the application "timely." The probate exception, however, is designed to protect, not only private litigants, but also the authority and dignity of a state court system. There is no reason to conclude that Congress would have intended to permit a federal court to directly interfere with a state probate proceeding whenever a particular litigant is found to have waited too long to request abstention.[40]

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the court below.

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[40] If, however, this Court determined that the question presented by this case ought not to arise in ordinary circumstances because section 1334(c)(2) should uniformly require abstention from claims that would otherwise be barred by the probate exception, the petition for certiorari should be dismissed as improvidently granted.

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No. 04-1544

In The Supreme Court of the United States

VICKIE LYNN MARSHALL,

Petitioner,

v.

E. PIERCE MARSHALL,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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L. Spindler, *Making Sausage Make Sense. Domestic Relations In Bankruptcy*, 4 Norton Bankr. L. Adviser 6 (1997) 9

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INTRODUCTION

The Respondent's Brief employs three strategies to sell its broad "probate exception" to federal bankruptcy jurisdiction. First, it relies heavily on dicta rather than holdings. Emblematic of this approach, the brief offers this law review article quotation in support of its claim of a broad, widely-accepted probate exception: "'[O]ne of the most widely stated generalizations in the area of federal jurisdiction is that federal courts can exercise no probate jurisdiction. Statements have been made to that effect in approximately 250 reported federal cases.'" Resp. Br. 26, quoting Allan D. Vestal & David L. Foster, *Implied Limitations of the Diversity Jurisdiction of Federal Courts*, 41 Minn.L.Rev. 1, 13 (1956-1957). But the brief omits the article's next sentence that directly undermines the brief's central thesis: "The *holdings* of the cases, however, do not support the generalization."

Second, the brief places great emphasis on an inaccurate version of the facts. For example, the brief contends Vickie went to the bankruptcy court because she was forum-shopping her claim of tortious interference with an inter vivos gift. Resp. Br. 3-5 & n.2 & n.5, 26. But the very first time she asserted that claim was in the bankruptcy court in 1996, as a compulsory counterclaim to Pierce's creditor's claim. JA 23-25; SER 6020, 6757; App. 179-80, 197. Four years later, in 2000, she filed it in the probate court, as a prophylactic measure after Pierce asserted the bankruptcy court lacked jurisdiction to decide it. ER 2838, 2863-65, 2875; SER 12660; App. 195. The brief distorts these facts by conflating two separate "tortious interference" claims: a claim for interference *with spousal support* that Vickie filed in Howard's 1995 *guardianship* proceeding, and the unrelated interference *with gift* claim she filed in 2000 in Howard's *probate* case. *Compare* JA 9, 11, *with* ER 2838, 2863-65, 2875; *see* Pet. Br. 2-4.

Third, the brief argues policy, much of it a paean to exclusive probate court jurisdiction of all matters related to a decedent's property. Whatever the merits of such a

scheme – and whether they outweigh the policies that inform the present system of concurrent federal jurisdiction over such matters – are questions for Congress.

To prevail here, Pierce must be right twice: Congress must have intended an implied "probate exception" to bankruptcy jurisdiction, *and* that exception must be broad enough to encompass Vickie's tort action against Pierce. But his argument for an implied exception in bankruptcy is wrong because (a) no "probate exception" applied in bankruptcy when Congress adopted the Bankruptcy Act in 1978; (b) the purpose of the 1978 bankruptcy overhaul was expressly to *expand* jurisdiction over bankruptcy-related claims and eliminate the balkanization that a "probate exception" would represent; and (c) Congress addressed federal-state comity concerns in bankruptcy through broad abstention provisions, not jurisdictional exclusions. And Pierce is also wrong about there being a broad probate exception – for the simple reason that this Court's cases completely refute it.

Finally, virtually every policy concern raised by Pierce and his amici are addressed by application of currently prevailing preclusion and bankruptcy abstention principles. To the extent (if any) they are not, the proper audience is Congress.

ARGUMENT

I. CONGRESS INTENDED NO "PROBATE EXCEPTION" TO THE BANKRUPTCY JURISDICTION CONFERRED BY 28 U.S.C. SECTION 1334.

Relying on the "implied acquiescence" holding in *Ankenbrandt v. Richards*, 504 U.S. 689 (1992), Pierce argues that a probate exception should be implied into 28 U.S.C. § 1334 because courts "have long understood the probate exception to apply in bankruptcy and other federal-question cases" and "Congress should not be presumed to have intended to change a longstanding practice

– particularly one established, not only in bankruptcy but elsewhere – without saying so." Resp. Br. 44-45. Pierce's theory fails.

A. There Was No "Longstanding And Well-Known" Probate Exception To Bankruptcy Jurisdiction When Congress Adopted The Bankruptcy Act In 1978.

Ankenbrandt's "implied acquiescence" holding rested on Congress' re-enactment of the diversity statute in 1948, when there was a "longstanding and well-known construction of the diversity statute" recognizing a domestic relations exception. *Ankenbrandt*, 504 U.S. at 700. By contrast, when Congress enacted the 1978 Bankruptcy Act, there was no such practice in bankruptcy cases.

Pre-1978 bankruptcy cases: Pierce and his amici rely primarily on *Harris v. Zion Sav. Bank & Trust Co.*, 317 U.S. 447 (1943), claiming *Harris* "applied the probate exception to reject the bankruptcy court's assertion of bankruptcy jurisdiction under an express statutory grant." Resp. Br. 43; *see also* amicus brief of professors Young and Elliot (ALP) 23. *Harris* did no such thing. Although it noted in dicta "that the federal courts have no probate jurisdiction" – the language Pierce emphasizes – it made no ruling regarding the applicability of any so-called probate exception. *Id.* at 450-52. The Court determined solely whether Congress intended section 75 of the Bankruptcy Act of 1898 to permit a personal representative to revive a decedent farmer's bankruptcy action without authorization from the probate court that appointed him – a question it would not have had occasion to reach had it determined there was no federal jurisdiction under a probate exception. Indeed, *Harris*' utter inapplicability here is made clear by the dissent's observation that had "this been an ordinary bankruptcy case," not one involving this particular statute, "there can be no doubt that the personal representative of this decedent would have been

entitled to" proceed with the bankruptcy. 317 U.S. at 454 (Douglas, J., dissenting.)

Pierce and his amici rely on only one other pre-1978 bankruptcy case, *Bank of Hamburg v. Tri-State Sav. & Loan Ass'n*, 69 F.2d 436, 437-38 (8th Cir. 1934). Resp. Br. 45. But *Hamburg* does not discuss or apply a probate exception; it merely applied a rule, abrogated in 1978, that conditioned bankruptcy jurisdiction on the parties' consent or on the debtor's or trustee's possession of the res. 69 F.2d at 437-38 (no bankruptcy jurisdiction because parties had not consented and executor of probate estate had possession of land); *see Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995).[1]

Pre-1978 non-bankruptcy cases: Pierce and his amici also cite *Markham v. Allen*, 326 U.S. 490 (1946). Resp. Br. 43; ALP 12. Although *Markham* concerned issues of federal law, it did not discuss whether the probate exception applied to non-diversity cases, let alone to bankruptcy cases, because it found that a probate exception would not in any event apply to the claim before it. The rest of Pierce and his amici's pre-1978 cases are diversity cases, which do not consider whether a probate exception applies in bankruptcy. *See* Pet. Br. 15-24, 34 n.25.[2]

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[1] The only post-1978 decisions citing *Hamburg* recognize that federal bankruptcy jurisdiction *now exists* in the circumstances *Hamburg* addressed; each cites *Hamburg* to show that federal courts have *discretion*, under section 1334(c)(1), to *abstain* in favor of probate courts. *See In re Robino*, 243 B.R. 472, 495 (Bankr. N.D. Ala. 1999); *In re Tarkio College*, 137 B.R. 34, 36 (W.D. Mo. 1992); *Matter of Bob Lee Beauty Supply Co.*, 56 B.R. 17, 20 (Bankr. N.D. Ala. 1985).

[2] Amicus Washington Law Foundation (WLF) unsuccessfully attempts to distinguish the three cases cited in footnote 25 of Petitioner's Brief. It argues two of them involve divorce proceedings. WLF Br. 13. But the point is that these cases, after analyzing section 1334's language and legislative history, properly recognize that Congress intended that bankruptcy courts have exclusive *in rem* jurisdiction over all property of the bankruptcy estate even where other courts previously had *in rem* jurisdiction. Cases in *non-divorce* contexts agree. *E.g*, *In re Noletto*, 244 B.R. 845, 853 (Bankr. S.D. Ala. 2000); *In re Fagel*, 234

(Continued on following page)

Conclusion: Pierce's handful of authorities provide "no confidence" that his purported probate exception to bankruptcy jurisdiction "is 'the type of "rule" that . . . Congress was aware of when enacting [section 1334].'" *Hartford Underwriters Ins. Co. v. Union Planters Bank*, 530 U.S. 1, 10 (2000) (similar authorities did not "establish a bankruptcy practice sufficiently widespread and well recognized to justify the conclusion of implicit adoption by the Code"); *accord Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 North LaSalle Street P'ship*, 526 U.S. 434, 462 (1999) (Thomas, J., concurring) (pre-Code practice could not "inform the interpretation" of a statute given "the sparse history" of the purported implied exception, including references "in dictum").[3]

B. Congress Enacted Section 1334 To Depart From Pre-1978 Jurisdictional Doctrines.

The keystone of *Ankenbrandt*'s "implied acquiescence" holding is that Congress explained when re-enacting the diversity statute in 1948 that "'no changes of law or policy are to be presumed from changes of language in the revision unless an intent to make such changes is clearly

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B.R. 784, 786 (Bankr. C.D. Cal. 1999); *In re Sundance Corp.*, 149 B.R. 641, 650 (Bankr. E.D. Wa. 1993). WLF claims the third case is inapposite because it was a federal admiralty proceeding and section 1334(b) "refers to 'any *Act of Congress* that confers exclusive jurisdiction' but makes no mention of 'state law' that confers exclusive jurisdiction." WLF Br. 10, 14, emphasis in original. There was no need for Congress to specifically mention "state law," because section 1334(b)'s grant of concurrent bankruptcy jurisdiction necessarily preempted, under the Supremacy Clause, any state laws conferring exclusive jurisdiction on state courts.

[3] The 1978 Act's legislative history repeatedly references case precedent or existing doctrines where relevant to interpreting the statutes. *See, e.g.*, H.R. Rep. No. 95-595, at 315-16, 319, 330, 339, 353, 355-59, 361, 367-69 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6272-73, 6276, 6286, 6295-96, 6309, 6311-15, 6317, 6323-25. It contains no references to *Harris*, *Markham* or the other cases and concepts on which Pierce relies.

expressed.'" *Ankenbrandt*, 504 U.S. at 700. Here, in contrast, it is undisputed that Congress enacted section 1334 to *expand* bankruptcy jurisdiction beyond that conferred by the diversity and federal-question statutes and all prior bankruptcy acts.

Section 1334's jurisdictional grant "was a distinct departure from the jurisdiction conferred under previous acts, which had been limited to either possession of property by the debtor or consent as a basis for jurisdiction." *Celotex*, 514 U.S. at 308. The "related to" jurisdiction "extends federal bankruptcy jurisdiction further than any of the prior bankruptcy statutes," going "beyond even Justice Story's image of a general federal bankruptcy jurisdiction over all claims by and against the bankruptcy estate" and including "third-party disputes to which the bankruptcy estate is not a party, but that are nonetheless 'related to' a bankruptcy case in some manner." Ralph Brubaker, *One Hundred Years Of Federal Bankruptcy Law And Still Clinging To An In Rem Model Of Bankruptcy Jurisdiction*, 15 Bankr. Dev. J. 261, 272-73 (1999).

Thus, *Ankenbrandt*'s basic rationale cannot apply here. "[I]t makes little sense to graft onto the Code concepts that were developed during a quite different era of bankruptcy," particularly where Congress intended to depart from them. *Bank of Am. Nat'l Trust & Sav. Ass'n*, 526 U.S. at 461-62 (Thomas, J., concurring) (reliance on pre-Code practices dubious because "[t]he Code's overall scheme often reflects substantial departures from various pre-Code practices").

Pierce and his amici therefore err in relying on *Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection*, 474 U.S. 494, 501 (1986) and *Cohen v. De La Cruz*, 523 U.S. 213, 221 (1998). Resp. Br. 45; ALP Br. 24. There, the Court "used prior practice to fill in the details of a pre-Code concept that the Code had adopted without elaboration." *Hartford Underwriters*, 530 U.S. at 11. In section 1334, Congress did not adopt pre-1978 jurisdictional concepts without elaboration; it enacted the statute to depart from them.

C. Congress Did Not Intend A Probate Exception To Bankruptcy Jurisdiction.

Pierce and his amici claim that the Court must assume Congress intends to exclude probate or domestic-relations matters from all jurisdictional grants unless it expressly says otherwise. Resp. Br. 17, 45; ALP Br. 13, 22. This "Congress means what it doesn't say" presumption is a perversion of statutory construction. A court must "begin with the understanding that Congress 'says in a statute what it means and means in a statute what it says there.'" *Hartford Underwriters*, 530 U.S. at 6. The legislative history confirms Congress did so here.

Pierce claims there is "no plausible reason why Congress would have intended to apply the probate exception to the federal adjudication of state law claims by a federal court sitting in diversity, but not to one adjudicating precisely the same claims in a bankruptcy adversary proceeding. . . ." Resp. Br. 47. Not so. "'Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with *all matters* connected with the bankruptcy estate.'" *Celotex*, 514 U.S. at 308 (emphasis added).

Although Pierce labels the legislative history "sparse," Resp. Br. 46, it demonstrates that Congress irrefutably intended to confer "broad and complete jurisdiction over all matters and proceedings that arise in connection with bankruptcy cases," including "all litigation having a significant connection with bankruptcy." H.R. Rep. No. 95-595, at 47-49, *as reprinted in* 1978 U.S.C.C.A.N. at 6009; see Ralph Brubaker, *On The Nature Of Federal Bankruptcy Jurisdiction: A General Statutory And Constitutional Theory*, 41 Wm. & Mary L. Rev. 743, 847 (2000) [hereinafter, "*Nature Of Federal Bankruptcy Jurisdiction*"] ("The bankruptcy jurisdiction statute unquestionably contains a general federal bankruptcy jurisdiction over all claims by and against the bankruptcy estate"). Indeed, Congress described the scope of "related to" jurisdiction alone as "'pervasive,' 'complete,' 'comprehensive,' 'as broad

[a] jurisdiction as possible', and 'as broad as can be conceived.'" *Id.*, 41 Wm. & Mary L. Rev. at 796-97. It sought "a federal bankruptcy jurisdiction as expansive as is constitutionally permissible." *Id.* at 805 n.224.

Discussion regarding potential grounds for lifting the automatic stay further demonstrates that Congress did not intend probate or domestic-relations exceptions to bankruptcy jurisdiction:

> [A] desire to permit an action to proceed to completion in another tribunal may provide another cause [to lift the stay]. Other causes might include the lack of any connection with or interference with the pending bankruptcy case. For example, a divorce or child custody proceeding involving the debtor may bear no relation to the bankruptcy case. In that case, it should not be stayed. A probate proceeding in which the debtor is the executor or administrator of another's estate usually will not be related to the bankruptcy case, and should not be stayed. . . . The facts of each request will determine whether relief is appropriate under the circumstances.

H.R. Rep. 95-595, at 343-44, *as reprinted in* 1978 U.S.C.C.A.N. at 6300. This advice would have been unnecessary had Congress believed the domestic relations and probate exceptions applied in bankruptcy.

Bankruptcy courts are unlikely to become probate or family law courts, because divorce, child-custody and will-probate decrees generally are not "related to" bankruptcy cases.[4] But disputes regarding asset allocation or damages that could impact the administration or distribution of the bankruptcy estate *are* "related to" a bankruptcy case,

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[4] Although bankruptcy courts do not issue divorce decrees, for example, they can refuse to lift stays of divorce proceedings where they suspect "collusion between the spouse to stage a divorce to avoid payment of the just claims of creditors." *In re White*, 851 F.2d 170, 174 (6th Cir. 1988).

regardless of whether they might also relate to probate or divorce proceedings; in those contexts, the only germane question is whether the federal court should abstain under section 1334(c).

Pierce argues that section 1334(c)'s abstention provisions apply in non-probate contexts and that *Ankenbrandt* (decided fourteen years after the 1978 Act) said the domestic relations exception was jurisdictional.[5] Resp. Br. 48. But Congress adopted the abstention provisions in lieu of jurisdictional limitations. *See* H.R. Rep. No. 95-595, at 51, *as reprinted in* 1978 U.S.C.C.A.N. at 6012; Brubaker, *Nature Of Federal Bankruptcy Jurisdiction*, *supra*, 41 Wm. & Mary L. Rev. at 797-98 & n 198, 802-03; Block-Lieb, *Permissive Bankruptcy Abstention*, *supra*, 76 Wash. U. L.Q. at 805-06, 810-14. More specifically, there is broad understanding that "bankruptcy courts have the jurisdiction to adjudicate probate matters involving a decedent debtor or a decedent non-debtor in which a debtor has an interest" and that "[a]bstention under these varying circumstances is discretionary." Bernard Schenkler, *Death And Bankruptcy: How The Probate And Bankruptcy Processes Interact*, 3 J. Bankr. L. & Prac. 453, 466-467 (1994) (see cases cited therein); *see also* Gregory McCoskey, *Death And Debtors: What Every Probate Lawyer Should Know About Bankruptcy*, 34 Real Prop. Prob. & Tr. J. 669, 674-76

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[5] There is ample authority that even after *Ankenbrandt* domestic relations issues are not jurisdictional in bankruptcy, but rather are matters of abstention. *E.g.*, *Cummings v. Cummings*, 244 F.3d 1263, 1267 (11th Cir. 2001); Susan Block-Lieb, *Permissive Bankruptcy Abstention*, 76 Wash. U. L.Q. 781, 817 & n.175 (1998) (appellate courts "agree that bankruptcy courts are frequently justified in abstaining from domestic relations issues, such as divorce, alimony, child support and the like"); L. Spindler, *Making Sausage Make Sense: Domestic Relations In Bankruptcy*, 4 Norton Bankr. L. Adviser 6, 6 (1997) (bankruptcy is "major exception" to *Ankenbrandt* rule; "bankruptcy courts regularly must review the divorce proceeding's orders and agreements under the fresh start rubric").

(2000); *In re Brown*, 1996 WL 757100, *3 (Bankr. E.D. Va. 1996); *and see* cases cited at footnote 1, *supra*.

Pierce and his amici cite to only one snippet from the legislative history as purportedly supporting their "implied acquiescence" theory – Congress' acceptance of the Bankruptcy Commission's recommendation against allowing an insolvent decedent's estate to file for bankruptcy. Resp. Br. 47; ALP Br. 24. The Commission's sole focus was whether to deviate from previous practice disallowing such filing, and it found that "numerous practical problems and questions would arise if the traditional exclusion [were] eliminated"; the Commission did not mention any "probate exception" to jurisdiction, nor did it indicate that only a state probate court could adjudicate a bankrupt-debtor's tort claims against an heir of a decedent's estate. *See* Report Of The Commission On The Bankruptcy Laws Of The United States, H.R. Doc. 93-137, pt. 1, at 183-85 (1973). To the contrary, it advocated bankruptcy jurisdiction over "all controversies between a trustee in bankruptcy on behalf of the estate and any third party." *Id.* at 6.[6]

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[6] The exclusive *in rem* jurisdiction section 1334(e) confers over bankruptcy estate property (*Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 447 (2004)) confirms that Congress did not intend to deny bankruptcy jurisdiction over Vickie's claim – the estate's primary asset and means by which creditors will be paid (SER 6074-75, DC 98, Tab 31, p. Bk 465). Pierce claims section 1334(e) applies only to "ordinary property of the bankruptcy estate, which does not include a debtor's causes of action." Resp. Br. 42 n.34. But because "property of the estate" is statutorily defined to include intangibles, a debtor's causes of action are subject to the exclusive *in rem* bankruptcy jurisdiction. *See* 11 U.S.C. § 541(a)(1); H.R. Rep. 95-595 at 175, 367, as reprinted in 1978 U.S.C.C.A.N. at 6137, 6323; *San Francisco v. PG&E Corp.*, 433 F.3d 1115, 1126 (9th Cir. 2006); *In re Polis*, 217 F.3d 899, 901 (7th Cir. 2000); *Baker v. Gold Seal Liquors, Inc.*, 417 U.S. 467, 476 (1974) (Stewart, J., concurring). The bankruptcy court, thus, has exclusive power to dispose of the debtor's third-party claims, *e.g.*, it can approve/deny proposed settlements or assignments or permit abandonment. The two amici law professors suggest that Vickie's section 1334(e) interpretation would preclude bankruptcy courts from abstaining in

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II. THIS COURT'S PRECEDENTS DEFEAT PIERCE'S BROAD "PROBATE EXCEPTION" TO FEDERAL JURISDICTION.

For all the reasons discussed above, Congress did not intend a "probate exception" to federal bankruptcy jurisdiction. But even if Congress had so intended, there still would be federal jurisdiction to adjudicate Vickie's tort claim.

From this Court's diversity cases holding that there is no jurisdiction to probate or, in some circumstances, annul wills, Pet. Br. 19-23, Pierce attempts to craft a broad "probate exception" that would prevent federal courts from "interfer[ing]" with probate proceedings by exercising "core probate functions," "disregarding or setting aside a probate court's probate judgment," or "resolv[ing] critical questions . . . a probate court must decide." Resp. Br. 1-2, 26-27. But this Court's cases do not come close to supporting the expansive jurisdictional principles Pierce advocates.[7]

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favor of state courts. ALP Br. 20-21. But section 1334(c) specifically provides that "[n]othing in this section prevents a district court . . . from abstaining," and settled precedent establishes a bankruptcy court's power to abstain even if its jurisdiction is "exclusive" (*e.g.*, *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478, 483 (1940), cited at H.R. Rep. 95-595, at 446, as reprinted in 1978 U.S.C.C.A.N. at 6401).

[7] Vickie has never urged, as Pierce contends, that this Court should abandon the narrow probate limitations on federal diversity jurisdiction its past cases recognize. Resp. Br. 24. To the contrary, Vickie acknowledges that statutory jurisdictional requirements and the *custodia legis* doctrine limit federal diversity jurisdiction to probate and (in some circumstances) annul wills and to administer probate estates. Pet. Br. 15-27. But the narrow limits intended by Congress do not warrant this Court engrafting the broad probate exception urged by Pierce and his amici.

A. Pierce's Broad "Interference" Test Directly Conflicts With This Court's Jurisprudence.

1. This Court's Will-Probate Cases Do Not Support Pierce's "Core Probate Functions" Analysis.

Several decisions of this Court hold there is no federal diversity jurisdiction to probate a will. *E.g.*, *Gaines v. Chew*, 43 U.S. (2 How.) 619, 644-47 (1844); *Armstrong v. Lear*, 25 U.S. (12 Wheat.) 169, 175-76 (1827). From these cases, Pierce concludes that federal courts may not trench on "core probate functions," a phrase he defines broadly enough to oust Vickie's tortious interference claim. Resp. Br. 27-28, 32-36.[8] He is wrong. These cases hold only that where a party premises a right to a decedent's property *on a will*, that party must "probate" the will – *i.e.*, "establish" or "prove" its validity – in state court as a predicate to seeking federal court relief.[9] *None* suggests that state

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[8] Although Pierce does not purport to adopt the "state law" test articulated by the Ninth Circuit and other federal courts, Pet. Cert. 14-15, 17, Pet. Br. 42-49, his brief is peppered with suggestions that state law should define what constitutes "core probate functions." Resp. Br. 14-15, 17-23, 32-35, 36. As we have demonstrated, this Court repeatedly has rejected a state law test. Pet. Br. 42-49; *see also Evans v. Pearson Enters., Inc.*, 434 F.3d 839, 849 (6th Cir. 2006) ("If . . . exclusive probate jurisdiction under state law were to determine federal jurisdiction, nothing would prevent a state from purposefully moving whole bodies of law into its probate courts to constrict federal diversity jurisdiction.").

[9] *Gaines v. Chew*, 43 U.S. at 645-46 (because probate court "has exclusive jurisdiction in the *proof of wills*," "the will of 1813 [must] be proved, before any title can be set up under it"); *Armstrong*, 25 U.S. at 175-76 (probate court must "pronounce upon [a purported will] as a testamentary paper, and to grant a probate" before will can be admitted as evidence of title); *see also Sutton v. English*, 246 U.S. 199, 205 (1918) ("as . . . the requirement of probate is but a regulation to make a will effective, matters of strict probate are not within the jurisdiction of the courts of the United States"); *O'Callaghan v. O'Brien*, 199 U.S. 89, 110 (1905) (same); *Ellis v. Davis*, 109 U.S. 485, 497 (1883) ("no instrument can be effective as a will until proved, no rights in relation to it . . . can arise until preliminary probate has been first made").

courts have exclusive jurisdiction to decide questions of intent, trust issues, or – as in the present case – a *damages claim* for interference with an intended inter vivos gift.

The will-probate cases do not suggest that federal courts lack jurisdiction over determinations of testamentary intent, much less donative intent during life. Enlisting this Court's will-probate cases, Pierce argues that determining a testator's intent is a "core probate function" that belongs exclusively to state courts. Resp. Br. 16, 32-34. But nothing in those cases suggests that state courts have exclusive jurisdiction to determine how a decedent intended to dispose of his assets, either upon death or during life. Indeed, this Court repeatedly has held the opposite. *E.g.*, *Waterman v. Canal-Louisiana Bank & Trust Co.*, 215 U.S. 33 (1909); *Byers v. McAuley*, 149 U.S. 608, 620-21 (1893); *Hayes v. Pratt*, 147 U.S. 557 (1893); *Wellford v. Snyder*, 137 U.S. 521 (1890); *Colton v. Colton*, 127 U.S. 300 (1888); *Smith v. Bell*, 31 U.S. (6 Pet.) 68 (1832).

Here, of course, the district court did not determine Howard's testamentary intent; it determined only that Howard intended to give Vickie an irrevocable gift during his life. The evidence established, and the district court expressly found, that while Howard's goal was to provide for Vickie after his death, he intended her trust to be a fully-funded and completed gift, vested and "legally enforceable" *during his life*. App. 80-83, 87-90, 158 n.10; SER 9567, 10611, 11100, 11788. Since federal courts have jurisdiction to decide the former, they certainly can decide the latter.

The will-probate cases do not suggest that federal courts lack jurisdiction over trusts. Pierce claims that because trusts largely have supplanted wills, this Court's will-probate cases preclude establishment of trusts that are "functionally indistinguishable from wills." Resp. Br. 16, 20. None of his cases so suggest, however. To the contrary, this Court has often held there is federal

jurisdiction to determine the existence of even testamentary trusts. *E.g.*, *Mandeville v. Canterbury*, 318 U.S. 47 (1943) (federal jurisdiction to determine rights in trust claimed to have been created under a will); *Byers*, 149 U.S. at 620-21 (1893) (provision of decedent's will constituted "a valid declaration of a trust"); *Colton*, 127 U.S. 300 (1888) (federal jurisdiction to determine rights in trust claimed to have been created under a will); *Fontain v. Ravenel*, 58 U.S. (17 How.) 369 (1854) (considering merits of whether decedent's will gave rise to charitable trust). Of course, this makes perfect sense: Trusts were the exclusive province of courts of equity, and since the probate limitation on federal diversity jurisdiction derives from the exclusive English ecclesiastical jurisdiction to probate wills, Congress cannot be presumed to have intended its extension to trusts. Pet. Br. 19-23.[10]

In any event, even if trusts that effect *testamentary* transfers were somehow outside federal diversity jurisdiction, there would still be federal jurisdiction over the irrevocable *inter vivos* trust Howard intended to create for Vickie. None of Pierce's cases suggests that federal courts lack jurisdiction over claims arising out of a trust intended to be a completed gift *during a decedent's life*.[11]

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[10] Wills and trusts continue to serve very different purposes. Inter vivos trusts are employed specifically to *avoid* probate, which "has earned a lamentable reputation for expense, delay, clumsiness, makework, and worse." John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 Harv. L. Rev. 1108, 1116 (1984). It would be truly perverse to conclude Congress intended to place trusts under the exclusive jurisdiction of the very courts their settlors seek to avoid.

[11] Indeed, Pierce's own definition of "will substitute" – which must "*reserve to the owner until death complete control over property governed by the instrument in question*, including the power to name and change beneficiaries" – plainly excludes Vickie's *irrevocable* trust. Resp. Br. 20, quoting Langbein, *Nonprobate Revolution, supra*, 97 Harv. L. Rev. at 1109 (emphasis added). It also excludes Howard's primary trust, which Pierce asserts was made irrevocable after Howard married Vickie. ER 645, 2656; App. 125.

The will-probate cases do not suggest federal courts lack jurisdiction over tort claims for interference with intended lifetime gifts or testamentary transfers. Pierce cites no case where this Court has held a damages claim to be exclusively within probate court jurisdiction, even if the claim concerns a decedent's intended testamentary disposition. Nor does he acknowledge this Court's cases approving federal jurisdiction over damages claims involving wills, such as for breach of a promise to leave property by will. *E.g.*, *In re Simons*, 247 U.S. 231 (1918); *Townsend v. Vanderwerker*, 160 U.S. 171 (1895); *Brown v. Sutton*, 129 U.S. 238 (1889).

2. This Court's Will-Annulment Cases Do Not Support Pierce's Attempt To Conflate Jurisdiction And Preclusion.

Several of this Court's decisions hold that because there is no federal diversity jurisdiction to *validate* a will, there also is no federal diversity jurisdiction to *invalidate* a probated will where the invalidation proceedings are a continuation of the probate. Pet. Br. 19; *Sutton*, 246 U.S. at 205 (federal equity courts lack jurisdiction "to set aside a will"); *O'Callaghan*, 199 U.S. at 110 (same); *Ellis*, 109 U.S. at 494 (federal court cannot "decree[] the invalidity of the will"); *In re Broderick's Will*, 88 U.S. 503, 509 (1874) ("a court of equity will not entertain jurisdiction of a bill to set aside a will"); *Fouvergne v. New Orleans*, 59 U.S. (18 How.) 470, 473 (1855) (probate judgments are conclusive of "the validity and contents of a will").[12] Like the limitation

[12] These cases recognize, however, that if under state law a will can be invalidated in an independent *inter partes* action, that cause of action can be pursued in federal court. *Sutton*, 246 U.S. at 205; *O'Callaghan*, 199 U.S. at 110-12; *Ellis*, 109 U.S. at 494-504. Although they thus hold that state law can *expand*, not *contract*, federal jurisdiction, the state amici cite them for the proposition that states can shield claims from federal jurisdiction by giving them exclusively to state probate courts. States' Br. 3-14. Not only is this assertion based on a

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on will-probate, this rule originates in the "peculiar constitution of the English courts" in 1789, when Congress enacted the first Judiciary Act. *Broderick's Will*, 88 U.S. at 509; *see also O'Callaghan*, 199 U.S. at 103 (citing historical analysis of *Broderick's Will*).

From these cases, Pierce attempts to derive the sweeping principle that federal courts lack jurisdiction to "disregard" probate judgments. Resp. Br. 28-31, 36-38.[13] But none of these cases holds that federal courts are *jurisdictionally* barred from deciding issues other than will validity, even if those issues were previously decided by probate courts. And, indeed, other decisions of this Court establish that a prior probate judgment on an issue other than will validity is *not* a jurisdictional bar. *E.g.*, *Colton*, 127 U.S. 300 (notwithstanding probate court judgment distributing property to decedent's wife under will, federal court had jurisdiction to impress property with trust in favor of decedent's mother and sister); *Johnson v. Waters*, 111 U.S. 640-75, 642 (1884) (federal court had jurisdiction over claim to set aside sales of testator's lands made by testamentary executor "under an order of the probate court"); *Arrowsmith v. Gleason*, 129 U.S. 86 (1889) (same result where sale of land was made under probate court authority by court-appointed guardian).

Of course, the Full Faith and Credit Act, 28 U.S.C. § 1738, requires that federal courts give preclusive effect to probate court judgments that resolve issues other than

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fundamental misreading of the cases, it violates this Court's holdings that federal jurisdiction cannot be impaired by state legislation creating probate courts. Pet. Br. 42-46.

[13] Pierce's argument presupposes that the probate court judgment preceded the federal judgment. In fact, the probate court judgment *followed* the bankruptcy court judgment by a year. JA 45, 106. Its preclusive effect thus turns on a number of issues the Ninth Circuit never reached, including whether Vickie's claim was a "core" bankruptcy matter. App. 1-38; SER 11932; Vickie's Combined Appellee's Brief/Cross-Appellant's Opening Brief at 87-93, 129-54.

will validity where preclusion is properly raised and proved. But preclusion is not jurisdiction: "If a federal plaintiff 'present[s] some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party . . . , *then there is jurisdiction* and state law determines whether the defendant prevails under principles of preclusion.'" *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 125 S. Ct. 1517, 1527 (2005) (emphasis added).[14]

The present case is not governed by the will-annulment cases because Vickie's claim did not challenge Howard's will, or even his primary trust. App. 28, 163, 167; *see also* Resp. Br. 37 n.28 ("Vickie does not specifically ask the federal court to set aside the Trust or declare it invalid"). The district court found only that Howard intended a gift for Vickie in the form of an irrevocable trust, and that Pierce interfered. App. 78-136, 202-07, 215-19. Accordingly, there is jurisdiction to decide Vickie's claim, and the effect of the probate court judgment is determined by preclusion law.[15]

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[14] Pierce claims preclusion law provides insufficient protection because duplicative probate-related litigation, even if ultimately unsuccessful, "imposes enormous costs on the parties and the federal courts." Resp. Br. 26. But these costs are inherent in "Congress' conferral of federal-court jurisdiction concurrent with jurisdiction exercised by state courts." *Exxon Mobil*, 125 S. Ct. at 1519; *see also Mandeville*, 318 U.S. at 49 (federal suit for construction of a will; "where the judgment sought is strictly in personam for the recovery of money . . . both a state court and a federal court having concurrent jurisdiction may proceed with the litigation at least until judgment is obtained in one court, which may be set up as res judicata in the other.")

[15] The district court held that the probate court judgment did not preclude the federal claim, and the Ninth Circuit never reached the issue. SER 10600-11, 11788; App. 37. The district court was correct. Vickie did not fully litigate her tortious interference claim in the probate court; she dismissed it mid-way through trial, no jury instructions were given on it, and the jury made no findings relating to it. SER 8426-27, 8585, 10306, 10605, 12260-61 & n.2, 12453 & n.9; *compare* JA 33-35, *with* JA 54-103; App. 163, 166-67. Nor did the probate court rule

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Pierce attempts to bring Vickie's claim within the will-invalidity cases by suggesting that although the district court did not *actually* invalidate Howard's will or trust, it *effectively* did so because the intended trust for Vickie was somehow incompatible with the primary trust because the two trusts were competing for the same assets. Resp. Br. 33-35, 36-38. Not so. A finding that Howard intended to give Vickie a gift during his life out of assets that were held in his primary trust (which at the time was revocable and placed no restrictions on his ability to use its assets, ER 531, SER 11240-41) did not "invalidate" the primary trust, any more than spending or giving away money after drafting a will "invalidates" the will. Creating a will or trust with residuary beneficiaries (like Howard's here, ER 537, 794) does not define *what* assets will be distributed upon death, but only to whom assets should pass. Thus, a decedent's use of his assets during his life for any purpose – whether by moving them into another trust or using them any other way – cannot invalidate a testamentary document.

B. Pierce's Suggested Expansion Of Statutory Limits On Federal Probate-Related Jurisdiction Is A Matter For Congress, Not The Courts.

Pierce urges that even if the present case does not "fall neatly" within this Court's precedents, it should

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on her dismissed claim or preclude her from pursuing it in federal court; it stated: "We didn't try any issue of interference with inter vivos gift at all." SER 8660; *see also* SER 8674 (Vickie's federal suit is "only a claim for damages against Pierce, personally, individually, based on his personal, individual conduct, and [that] had nothing to do with this Court's jurisdiction over this Estate"), 8658, 8663-64. It also did not find that Vickie's claim was a compulsory counterclaim, JA 129; SER 8670-71; *see* Pet. Br. 42 n.30, or a claim over which it had exclusive jurisdiction, JA 116; SER 8664 (only "deciding all the issues concerning the Estate," but "not any complaints that [Vickie] has against [Pierce]"), 8669, 8674.

"adapt" – that is to say, *expand* – the probate exception consistent with the doctrine's "animating principles." Resp. Br. 40. But these so-called "animating principles" – the most important of which, Pierce contends, is protecting state probate jurisdiction from federal interference in order "to avoid competing struggles among courts," *id.* at 18 – simply do not exist. As we have shown, the limit on federal diversity jurisdiction to probate and annul wills derives from the distribution of power among the English courts, not a Congressional comity-based policy judgment. Pet. Br. 19-23. Moreover, this Court has never held that all probate-related matters must be centralized in a single court to avoid irreconcilable jurisdictional conflicts.[16] To the contrary, this Court expressly has held that even if it "may be convenient" for all probate-related claims to be heard in a single court, that fact does not "deprive [the federal courts] of jurisdiction to hear and determine a controversy between citizens of different states." *Hess v. Reynolds*, 113 U.S. 73, 77 (1885).[17] And, as Pierce himself concedes, Resp. Br. 28, this Court repeatedly has affirmed federal jurisdiction to decide all manner of probate-related disputes, notwithstanding the exclusive jurisdiction of state courts to distribute probate assets *after* those disputes are resolved. *See* cases cited at Pet. Br. 11-25.[18]

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[16] Pierce's authorities say nothing of the sort – including *Union Bank of Tennessee v. Vaiden*, 59 U.S. 503, 507 (1855), which Pierce quotes for the proposition that "This Court has recognized that, if federal courts could exercise unlimited concurrent jurisdiction over probate matters, 'the conflict of jurisdictions would be irreconcilable and disastrous.'" Resp. Br. 23. The quoted language, however, is not the Court's; it is *counsel's argument*, which the Court *rejected*. *Union Bank of Tennessee*, 59 U.S. at 507.

[17] Indeed, this Court's cases illustrate that multiple-court involvement in succession determinations is commonplace. *E.g.*, *Hanson v. Denckla*, 357 U.S. 235 (1958); *Riley v. New York Trust Co.*, 315 U.S. 343 (1942).

[18] Adjudication of related (or even identical) issues in multiple courts is a distinguishing feature of our system of concurrent federal/

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The policy arguments of Pierce and his amici are simply irrelevant here, because the jurisdiction of the lower federal courts is the exclusive province of Congress. *E.g.*, *Ankenbrandt*, 504 U.S. at 698. "Achieving a better policy outcome – if what [respondent] urges is that – is a task for Congress, not the courts." *Hartford Underwriters*, 530 U.S. at 13-14.

CONCLUSION

For the foregoing reasons, Petitioner urges that the decision of the Ninth Circuit Court of Appeals be reversed.

Respectfully submitted,

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state jurisdiction. *Exxon Mobil*, 125 S. Ct. at 1526-27. This Court therefore has been careful, in the interests of "harmonious cooperation of federal and state tribunals," not to permit state and federal courts concurrently to *administer* the same *res*. *Princess Lida v. Thompson*, 305 U.S. 456, 466 (1939). However, that principle has "*no application* to a case in a federal court . . . wherein the plaintiff seeks merely an adjudication of his right of his interest as a basis of a claim against a fund in the possession of a state court." *Id.*; *see* Pet. Br. 23-24. Here, because, as Pierce admits, at Howard's death there were no assets in his probate estate or trust, there was no *res* for the probate court to possess or administer. SER 5770, 6878-79, 7578, 7784, 11304. Moreover, Vickie's bankruptcy counterclaim sought only adjudication of her damages claim against Pierce; it did not seek to seize or control any property in the custody of the probate court. JA 23-25; App. 28, 162, 166-67.

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No. 04-1544

In the Supreme Court of the United States

VICKIE LYNN MARSHALL, PETITIONER

v.

E. PIERCE MARSHALL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether a claim that falls within the scope of the jurisdiction conferred upon the federal courts and that seeks neither to probate a will nor to administer or assume control over the property in a decedent's estate is nevertheless excepted from federal jurisdiction if it involves the adjudication of rights related to property that is the subject of an ongoing state probate proceeding.

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Miscellaneous:

3 William Blackstone, *Commentaries* 17
Erwin Chemerinsky & Larry Kramer, *Defining the Role of the Federal Courts*, 1990 B.Y.U.L. Rev. 67 24
Gregory C. Luke & Daniel J. Hoffheimer, *Federal Probate Jurisdiction: Examining the Exception to the Rule*, 39 Fed. B. News & J. 579 (1992) 24

Miscellaneous Page

Peter Nicolas, *Fighting the Probate Mafia: A Dissection of the Probate Exception to Federal Court Jurisdiction*, 74 S. Cal. L. Rev. 1479 (2001) 17, 18

1 John Norton Pomeroy, *A Treatise on Equity Jurisprudence as Administered in the United States of America* (5th ed. 1941) 17

John F. Winkler, *The Probate Jurisdiction of the Federal Courts*, 14 Prob. L.J. 77 (1997) 17

In the Supreme Court of the United States

No. 04-1544

VICKIE LYNN MARSHALL, PETITIONER

v.

E. PIERCE MARSHALL

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

The decision below adopts an expansive view of the so-called "probate exception" to federal jurisdiction, holding that "all federal courts * * * are required to refrain from deciding state law probate matters, no matter how the issue is framed by the parties." Pet. App. 2-3. In so holding, the court of appeals reasoned that state law can grant state probate courts sole jurisdiction over "all probate matters"—specifically including those "based on a theory of tax liability" or "debt"—to the exclusion of the courts of the United States. *Id.* at 34.

The United States has a substantial interest in the scope of any "probate exception" to federal jurisdiction. Congress has vested the federal courts with jurisdiction over all claims by (and many claims against) the United

States, including claims involving federal tax liability. See, *e.g.*, 28 U.S.C. 1340, 1345-1347, 1442, 1444, 2410. Pursuant to those jurisdictional grants, the United States files probate-related claims in federal court, such as claims regarding the tax liability of decedents' estates,[1] and removes to federal court probate-related claims brought against the United States in state court.[2] As a result, the scope of the so-called "probate exception" to federal jurisdiction has arisen, explicitly and implicitly, in cases involving the United States. See, *e.g.*, *Ashton* v. *Josephine Bay Paul & C. Michael Paul Found., Inc.*, 918 F.2d 1065, 1067-1068 (2d Cir. 1990); *Estate of Threefoot*, 316 F. Supp. 2d 636, 642-645 (W.D. Tenn. 2004). The United States therefore has a substantial interest in preserving its ability to have claims to which it is a party resolved in federal court as provided by Congress.

In addition, the United States Trustee Program, a component of the United States Department of Justice, has an interest in the efficiency and integrity of the federal bankruptcy system. Congress established the Program in the Bankruptcy Reform Act of 1978, 11 U.S.C. 101 *et seq.*, to further the public interest in the just,

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[1] See, *e.g.*, *United States* v. *Peoples Trust & Sav. Co.*, 97 F.2d 771 (7th Cir. 1938); *United States* v. *Estate of Slate*, 304 F. Supp. 380 (S.D. Tex. 1969), aff'd, 425 F.2d 1208 (5th Cir. 1970) (per curiam); *United States* v. *Acri*, 109 F. Supp. 943 (N.D. Ohio 1952), aff'd, 209 F.2d 258 (6th Cir. 1953) (per curiam), rev'd on other grounds, 348 U.S. 211 (1955).

[2] See, *e.g.*, *Ashton* v. *Josephine Bay Paul & C. Michael Paul Found., Inc.*, 918 F.2d 1065, 1067-1068 (2d Cir. 1990); *Estate of Johnson*, 836 F.2d 940 (5th Cir. 1988); *House* v. *United States*, 144 F.2d 555 (10th Cir.), cert. denied, 323 U.S. 781 (1944); *Estate of Threefoot*, 316 F. Supp. 2d 636, 642-645 (W.D. Tenn. 2004); *In re Palmer's Will*, 11 F. Supp. 301 (E.D. Okla. 1935).

speedy, and economical resolution of cases filed under the Bankruptcy Code. The Program monitors the conduct of bankruptcy parties and private estate trustees, oversees related administrative functions, and acts to ensure compliance with applicable laws and procedures. In the Program's view, recognition of a broad "probate exception" to the statutory jurisdiction of bankruptcy courts could interfere with the ability of the bankruptcy system to administer debtors' estates expeditiously, fairly, and efficiently for the benefit of creditors.

STATEMENT

1. J. Howard Marshall II (J. Howard) died on August 4, 1995, survived by two sons and petitioner, his third wife. Pet. App. 3, 11, 40. Respondent, one of J. Howard's sons, was the ultimate beneficiary of J. Howard's estate. *Id.* at 55. Respondent was also the primary beneficiary upon J. Howard's death of an inter vivos trust that J. Howard created in 1982, and J. Howard's last will and testament required the distribution of his probate property to the trust. *Id.* at 3-4.

Petitioner claims that during J. Howard's courtship of her, he promised to leave her half of his property if she would marry him, and that J. Howard's attorneys recommended the creation of a "catch-all" trust for her benefit. Petitioner further claims that respondent tortiously interfered with her expected inter vivos or post-mortem gift. Pet. App. 2, 4, 7 n.2.

2. After J. Howard's death, petitioner filed for bankruptcy under Chapter 11 of the Bankruptcy Code, 11 U.S.C. 1101 *et seq.*, in the United States District Court for the Central District of California. Pet. App. 12. Respondent filed a proof of claim for defamation against petitioner's bankruptcy estate, and sought a declaratory

ruling to prevent petitioner from obtaining a discharge in bankruptcy with respect to respondent's potential claim against her. *Ibid.* Petitioner counterclaimed against respondent for tortious interference with her expected gift. *Id.* at 12-13.

The bankruptcy court concluded that respondent had tortiously interfered with petitioner's expected gift. Pet. App. 201-221. The court awarded her compensatory damages of $449,754,134, less whatever she recovered in the ongoing probate action in Texas, together with punitive damages of $25 million. *Id.* at 199, 201-202, 221.

In a post-trial opinion, the bankruptcy court denied respondent's motion to dismiss for lack of subject matter jurisdiction, which asserted that petitioner's tortious interference claim could be tried only in the Texas probate proceeding. Pet. App. 190, 192-195. The bankruptcy court held that "the 'probate exception' argument was waived because it was not raised in a timely fashion." *Id.* at 190, 195. The court also observed, relying on *Markham* v. *Allen*, 326 U.S. 490 (1946), that a federal court has jurisdiction to "adjudicate rights in probate property, so long as its final judgment does not undertake to interfere with the state court's possession of the property." Pet. App. 194. Finally, the bankruptcy court concluded that petitioner's tortious interference claim, as a counterclaim to respondent's claim against the bankruptcy estate, was within the court's "core" jurisdiction under 28 U.S.C. 157(b)(2)(C), and thus that it had the authority to enter a final judgment. Pet. App. 196-199.

3. While the bankruptcy action was pending, petitioner and respondent (and others) were also engaged in litigation in the Texas probate court. Respondent sought a declaration that his father's will and the 1982

inter vivos trust were legally valid. Petitioner challenged the validity of the will and filed a tortious interference claim against respondent. Pet. App. 11.

After the bankruptcy court entered judgment for petitioner, she voluntarily dismissed all of her pending claims in the Texas probate proceedings. Pet. App. 17-18. She remained a party to those proceedings, however, as a defendant in the declaratory judgment action brought by respondent to establish the validity of J. Howard's will and the 1982 trust. *Id.* at 18. Following a jury trial of that action, the Texas probate court entered a final judgment upholding the validity of the decedent's will and the 1982 trust. *Id.* at 19. The court also determined that J. Howard did not intend to give petitioner a gift or bequest from his estate or the 1982 trust and that petitioner was not entitled to any distribution from the estate "by virtue of an agreement." *Id.* at 20-21.

4. Respondent appealed the judgment of the bankruptcy court to the district court, where he again urged that petitioner's claims were subject to dismissal under the "probate exception" to federal jurisdiction. Pet. App. 21, 157. The district court rejected the bankruptcy court's conclusion that respondent had waived the argument, but held that the "probate exception" was inapplicable. *Id.* at 158-170. The district court observed that petitioner's "counterclaim is asserted against [respondent] individually and makes no claim against the estate or even against the trusts existing at the time of J. Howard, Sr.'s death." *Id.* at 166. The district court concluded that, by exercising jurisdiction over that claim, "the bankruptcy court did not assert jurisdiction generally over the probate proceedings for J. Howard, Sr. or take control over his estate's assets." *Id.* at 162.

It further concluded that federal jurisdiction would not "interfere" with the probate proceedings because petitioner's counterclaim did not rest on an assertion that J. Howard's will was invalid and because the counterclaim was not within the exclusive jurisdiction of the Texas probate court. *Id.* at 163-170.

Although it affirmed the existence of federal subject matter jurisdiction, the district court held that petitioner's counterclaim for tortious interference was not part of the bankruptcy court's "core" jurisdiction. Pet. App. 173-187. As a result, the bankruptcy court lacked jurisdiction to enter a final judgment, and the district court reviewed petitioner's counterclaim de novo. *Id.* at 186-187; *id.* at 40; see 28 U.S.C. 157(c)(1). The district court found that respondent had tortiously interfered with petitioner's expectancies and awarded her compensatory damages of $44,292,767.33, plus punitive damages in the same amount. Pet. App. 132-136, 143, 147.[3]

5. The court of appeals reversed the district court's ruling that it had subject matter jurisdiction. Pet. App. 1-38. It held that all federal courts, including bankruptcy courts, are "bound by the probate exception to federal jurisdiction," regardless of the basis on which federal jurisdiction would otherwise exist. *Id.* at 2-3, 24-26.

The court of appeals recognized that petitioner's claim did "not involve the administration of an estate, the probate of a will, or any other purely probate mat-

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[3] Both the bankruptcy court and the district court found that J. Howard intended to give petitioner half the increase in value of his assets from the date of the marriage. See Pet. App. 137, 216. The district court, however, valued the increase as of the date of J. Howard's death, while the bankruptcy court valued it as of the date of trial. See *id.* at 7, 143, 219-220.

ter." Pet. App. 28. Nevertheless, the court held that the federal courts would be deprived of otherwise proper federal jurisdiction if petitioner's claim were "probate related," that is, if exercising jurisdiction would "(1) interfere with the probate proceedings; (2) assume general jurisdiction of the probate; or (3) assume control over property in custody of the state court." *Ibid.* (citing, *inter alia*, *Markham*, 326 U.S. at 494).

In the court of appeals' view, a claim satisfies that "probate related" test if it raises "questions which would ordinarily be decided by a probate court in determining the validity of the decedent's estate planning instrument," including fraud, undue influence and tortious interference with a testator's intent. Pet. App. 29. The court of appeals also stated that, "[w]here a state has relegated jurisdiction over probate matters to a special court and if that state's trial courts of general jurisdiction do not have jurisdiction to hear probate matters, then federal courts also lack jurisdiction over probate matters." *Id.* at 34 (citing *McCan* v. *First Nat'l Bank*, 139 F. Supp. 224, 227 (D. Or. 1954), aff'd, 229 F.2d 859 (9th Cir. 1956) (per curiam)). According to the Ninth Circuit, a state's exclusive probate jurisdiction "extends to all probate matters whether based on a theory of tax liability, debt, gift, bequest, tort, or any other theory that interferes with the probate of wills or the state court's ability to engage in the administration of estates." *Ibid.* Because the court of appeals deemed petitioner's claims to be "simply a disguised attack on J. Howard Marshall II's 1982 trust, as amended, and on the postmortem disposition of his property" provided therein, the court of appeals concluded that the exercise of federal jurisdiction would "interfere with the probate proceedings" and "assume general jurisdiction of the

probate," and accordingly it held that federal jurisdiction was lacking. *Id.* at 28 & n.12, 36-37 & n.15.

SUMMARY OF ARGUMENT

The court of appeals' expansive interpretation of the so-called "probate exception" to federal jurisdiction cannot be reconciled with longstanding precedent from this Court. It is well established that the pendency of a state probate proceeding is no bar to the exercise of concurrent federal jurisdiction over a suit to determine rights to the property at issue in that probate proceeding. See, *e.g.*, *Markham* v. *Allen*, 326 U.S. 490, 494-495 (1946). The only limitation on such jurisdiction is that the federal judgment cannot be enforced directly against the decedent's estate, but must either take its place in the probate proceedings or be enforced against someone else who is liable. See, *e.g.*, *Waterman* v. *Canal-Louisiana Bank & Trust Co.*, 215 U.S. 33, 44 (1909).

Moreover, the existence of such federal jurisdiction cannot be defeated by state law. Rather, federal jurisdiction is conferred by the Constitution and Congress, and "is not subject to limitations or restraint by state legislation establishing courts of probate and giving them jurisdiction over similar matters." *Waterman*, 215 U.S. at 43. The case upon which respondent relies, *Sutton* v. *English*, 246 U.S. 199 (1918), is not to the contrary. At most, that case stands for the narrow proposition that federal courts lack original jurisdiction over matters of "strict probate"—the probate of a will or the annulment of a probated will—but, even then, only if the State does not allow such a remedy by an independent suit. *Id.* at 205. The *Sutton* limitation does not apply here because petitioner's counterclaim seeks neither to probate a will nor to invalidate a probated will. Pet.

App. 28. There is no warrant for extending that will-specific rule beyond its narrow bounds to encompass inter vivos and other trusts.

In any event, whatever the scope of the "probate exception" with respect to litigation between private parties, it would be particularly inappropriate to apply such an exception to litigation involving the United States. Congress has expressly vested the federal courts with jurisdiction to resolve most disputes involving the United States, and the availability of that federal forum should not be frustrated by an expansive judicially-created exception.

ARGUMENT

A. The Pendency Of A State Probate Proceeding Does Not Deprive A Federal Court Of Jurisdiction To Adjudicate Rights To Property Of The Decedent's Estate

The Ninth Circuit's articulation of a sweeping, extratextual "probate exception" to federal jurisdiction cannot be squared with the constitutional and statutory provisions granting federal jurisdiction to the federal courts. As this Court observed long ago, "[j]urisdiction as to wills, and their probate as such, is neither included in nor excepted out of the grant of judicial power to the courts of the United States." *Ellis* v. *Davis*, 109 U.S. 485, 497 (1883). And nothing in this Court's cases interpreting the scope of that grant supports the broad exception adopted by the court of appeals.

1. It has long been established that, when a dispute is within the jurisdiction granted to federal courts by the Constitution and the Congress, federal courts have jurisdiction to decide that dispute, even if the dispute involves the rights to property in a decedent's estate that is the subject of a pending state probate proceeding.

See, *e.g.*, *Markham*, 326 U.S. at 494-495; *McClellan* v. *Carland*, 217 U.S. 268, 282 (1910); *Waterman*, 215 U.S. at 43, 45-46; *Byers* v. *McAuley*, 149 U.S. 608, 618, 620 (1893).

Applying that principle, this Court has found federal jurisdiction over disputes that would appear to fall within the Ninth Circuit's broadly worded exception to jurisdiction for all "probate related" matters. For example, it is well settled that federal courts can adjudicate claims for debts allegedly owed by a decedent's estate, notwithstanding that "the judgment may affect the administration or distribution in another forum of the assets of the decedent's estate." *Hess* v. *Reynolds*, 113 U.S. 73, 77 (1885). Likewise, "a distributee * * * may establish his right to a share in the estate" through an action in federal court. *Byers*, 149 U.S. at 620. Federal courts can also determine entitlement to a lien on a distributive share of a decedent's estate. See, *e.g.*, *Ingersoll* v. *Coram*, 211 U.S. 335, 358-360 (1908).

The only qualification on the authority of a federal court in such cases goes not to its jurisdiction to decide the rights to a decedent's property or to enter a judgment binding on the parties with respect to such rights, but rather to the means by which that judgment may be enforced. If in rem probate proceedings are pending in state probate court, the federal judgment cannot be enforced directly against the decedent's property in the possession of the state court, but "must take its place and share of the estate as administered by the probate court," or be enforced "against the administrator personally, or his sureties * * * or against any other parties subject to liability." *Waterman*, 215 U.S. at 44 (citations

omitted).[4] Given that long-established precedent, the Ninth Circuit's conclusion that there is a probate-related exception to federal jurisdiction with respect to all "claims either against or on behalf of the decedent's estate," Pet. App. 34, simply cannot be sustained.

2. The recognition of federal jurisdiction over such probate-related matters is consistent with fundamental principles that apply whenever federal courts have concurrent jurisdiction with state courts. As this Court has observed, "[g]enerally, as between state and federal courts, the rule is that 'the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction.'" *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 817 (1976) (quoting *McClellan*, 217 U.S. at 282). That rule "stems from the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Id.* at 817; *Hyde* v. *Stone*, 61 U.S. (20 How.) 170, 175 (1858) ("[T]he courts of the United States are bound to proceed to judgment, and to afford redress to suitors before them, in every case to which their jurisdiction extends.").

Accordingly, under general jurisdictional principles, "[w]here the judgment sought is strictly *in personam*, for the recovery of money or for an injunction compelling or restraining action by the defendant, both a state court and a federal court having concurrent jurisdiction

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[4] If the state court were to deny the effect of the federal judgment, that would "present[] a claim of Federal right which may be protected in this court." *Waterman*, 215 U.S. at 46; see *Parsons Steel, Inc.* v. *First Ala. Bank*, 474 U.S. 518, 525 (1986); see also *Chick Kam Choo* v. *Exxon Corp.*, 486 U.S. 140, 150-151 (1988) (holding that federal courts can enjoin pending state court proceedings to prevent relitigation of an issue previously presented to and decided by a federal court).

may proceed with the litigation, at least until judgment is obtained in one court which may be set up as *res adjudicata* in the other." *Penn Gen. Cas. Co.* v. *Pennsylvania ex rel. Schnader*, 294 U.S. 189, 195 (1935); see, *e.g.*, *Commonwealth Trust Co.* v. *Bradford*, 297 U.S. 613, 618-619 (1936) (holding that federal jurisdiction existed to determine rights to assets in mortgage pool trust being administered by state court). This Court's precedents reveal constant adherence to that principle in probate-related matters as well. See, *e.g.*, *Markham*, 326 U.S. at 494-495; *McClellan*, 217 U.S. at 282; *Waterman*, 215 U.S. at 43, 45-46. That is the rule that governs this case.[5]

B. State Law Cannot Constrict Federal Jurisdiction Over Probate-Related Matters

The Ninth Circuit compounded its error by concluding (Pet. App. 34-36) that state law determines the scope of federal jurisdiction over all probate-related matters. That conclusion cannot be squared with the Supremacy Clause or this Court's precedents.

1. This Court long ago held that the jurisdiction of the federal courts to decide disputes "cannot be impaired by the laws of the States, which prescribe the modes of redress in their courts, or which regulate the

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[5] Given its holding regarding jurisdiction, the Ninth Circuit did "not address [respondent's] arguments concerning claim and issue preclusion." Pet. App. 37; see *In re Marshall*, 271 B.R. 858, 862-867 (C.D. Cal. 2001) (rejecting respondent's argument that the Texas judgment precluded petitioner's bankruptcy counterclaim). But, as this Court emphasized just last Term, the existence of parallel state and federal proceedings generally does not result in the elimination of federal jurisdiction; rather, preclusion law serves to prevent conflicting outcomes. *Exxon Mobil Corp.* v. *Saudi Basic Indus. Corp.*, 125 S. Ct. 1517, 1527 (2005).

distribution of their judicial power." *Payne* v. *Hook*, 74 U.S. (7 Wall.) 425, 430 (1869) (citation omitted). The Court explained that, "[i]f this position could be maintained, an important part of the jurisdiction conferred on the Federal courts by the Constitution and laws of Congress, would be abrogated." *Id.* at 429. Thus, in *Payne*, the Court held that the federal court had diversity jurisdiction over the plaintiff's fraud claim against the administrator of her brother's estate, even though the state probate court had exclusive jurisdiction over such claims as a matter of state law. *Id.* at 429-433.

Likewise, in *Waterman*, in finding federal jurisdiction to determine the interest of an heir in an alleged lapsed legacy, the Court reaffirmed the "general rule" that "inasmuch as the jurisdiction of the courts of the United States is derived from the federal Constitution and statutes * * * the jurisdiction may be exercised, and is not subject to limitations or restraint by state legislation establishing courts of probate and giving them jurisdiction over similar matters." 215 U.S. at 43. The Court applied that general rule to debt claims in *Hess*, observing that although "[i]t may be convenient that all debts to be paid out of the assets of a deceased man's estate shall be established in the court to which the law of the domicile has confided the general administration of these assets," 113 U.S. at 77, the jurisdiction of the federal courts to decide the "controverted question of debt or no debt * * * cannot be defeated by State statutes enacted for the more convenient settlement of estates of decedents." *Ibid.*; accord, *e.g.*, *McClellan*, 217 U.S. at 282; *Green's Administratrix* v. *Creighton*, 64 U.S. (23 How.) 90, 107-108 (1860).

2. Respondent asserts (Br. in Opp. 18-19, 23-24) that the court of appeals' reliance on state law to override

federal jurisdictional statutes is consistent with this Court's decision in *Sutton* v. *English*, *supra*. In *Sutton*, the Court addressed the question of federal diversity jurisdiction to decide a bill in equity by heirs-in-law seeking, among other things, to annul the decedent's previously probated will. 246 U.S. at 200-204. Reasoning that "the general jurisdiction of a court of equity to set aside a will or the probate thereof" is "not within the ordinary equity jurisdiction of the federal courts," the Court concluded that federal courts lack jurisdiction "to annul a will or to set aside the probate" unless state law gives parties the right to bring "independent suits" to pursue such a remedy, rather than providing for that remedy as a "procedure merely incidental or ancillary to the probate." *Id.* at 205; accord *Farrell* v. *O'Brien*, 199 U.S. 89 (1905).

Contrary to respondent's assertion, *Sutton* provides no support for the court of appeals' sweeping pronouncement (Pet. App. 34) that a State can strip a federal court of otherwise proper jurisdiction over "all claims either against or on behalf of the decedent's estate" by placing the resolution of those disputes within the exclusive jurisdiction of state probate courts. Under the court of appeals' rule, the state court could arrogate to itself exclusive jurisdiction over claims extending well beyond the pure probate of a will to include "all probate matters whether based on a theory of tax liability, debt, gift, bequest, tort, or any other theory that interferes with the probate of wills." *Ibid.* As demonstrated above, that very notion was rejected in *Waterman*, 215 U.S. at 43, which is cited and relied upon by *Sutton*, 246 U.S. at 205.

At most, *Sutton* holds only that, absent the creation of a state right to an independent suit in law or equity, "matters of strict probate are not within the jurisdiction

of courts of the United States." 246 U.S. at 205. In other words a federal court cannot "probate a will," *Markham*, 326 U.S. at 494, or (absent an independent cause of action) set aside a state court's probate thereof, *Sutton*, 246 U.S. at 205. Although neither *Sutton* nor its forebears provide a ready explanation for that limitation, the lack of authority to probate a will in the first instance appears to flow, at least in part, from the notion that a will must be "probated" by a state authority to have any effect. *Farrell*, 199 U.S. at 110. As the Court explained in *Farrell*, "the requirement of probate is but a regulation to make a will effective," *ibid.*, and "no instrument can be effective as a will until proved, no rights in relation to it, capable of being contested between parties can arise until preliminary probate has first been made." *Id.* at 107 (quoting *Ellis* v. *Davis*, 109 U.S. 485, 497 (1883)).[6]

Once the state court has established a will through probate (as had occurred in *Sutton* and its forebears),[7] if state law requires all contests to that will to be

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[6] In addition, the Court observed that the proceeding to probate a will is often "*ex parte* and merely administrative," lacking the requisite controversy between parties to confer diversity jurisdiction. *Farrell*, 199 U.S. at 107 (quoting *Ellis*, 109 U.S. at 497). Thus, the requirement to probate could be analogized to an exhaustion requirement.

[7] See, *e.g.*, *Sutton*, 246 U.S. at 207 (noting that plaintiffs sought to have will annulled); Brief for Appellees at 49-51, *Sutton*, *supra* (No. 330) (orders of state probate court establishing wills); *Waterman*, 215 U.S. at 45-46 (noting that plaintiff "does not seek to set aside the probate of the will, which the bill alleges was duly established and admitted to probate in the proper court of the State"); *Farrell*, 199 U.S. at 101 (noting that federal claim "assailed the previous probate"); *Ellis*, 109 U.S. at 493 (noting that federal claim sought to have probated will declared "null and void"); *In re Broderick's Will*, 88 U.S. (21 Wall.) 503, 517 (1875) (noting probate proceeding had closed).

brought in the probate court itself or on appeal from that court, then allowing a subsequent federal suit to annul an already-probated will would directly interfere with the in rem state proceedings, see *Waterman*, 215 U.S. at 44 (explaining *Farrell*), and would, in effect, allow a collateral challenge to a state court ruling in federal district court. See *Exxon Mobil Corp.* v. *Saudi Basic Indus. Corp.*, 125 S. Ct. 1517, 1526 (2005); *District of Col. Ct. of Appeals* v. *Feldman*, 460 U.S. 462 (1983); *Rooker* v. *Fiduciary Trust Co.*, 263 U.S. 413 (1923). Thus, as *Sutton* held, unless state law provides for such a collateral challenge by way of an independent suit (which could then be brought in federal court), a contest to an established will must be brought in the state probate proceedings or on direct appeal therefrom. 246 U.S. at 207.

In any event, whatever the explanation, the limitation on federal jurisdiction discussed in *Sutton* is a very narrow one, applying only to "matters of pure probate, in the strict sense of the words." *Farrell*, 199 U.S. at 110; cf. *Ankenbrandt* v. *Richards*, 504 U.S. 689, 703 (1992) (concluding that "domestic relations" exception was a narrow one, applying only to the power "to issue divorce, alimony, and child custody decrees"). Here, the Ninth Circuit correctly concluded that petitioner's claim did not entail "the probate of a will, or any other purely probate matter." Pet. App. 28.[8] Accordingly, the *Sutton* analysis is inapplicable to this case.

Moreover, to the extent the *Sutton* analysis (and the *Markham* Court's reiteration of that analysis in dicta,

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[8] As the court of appeals explained, the district court did not decide "whether the last will and testament of J. Howard Marshall II should be admitted to probate," nor did it "supervise the administration of the estate of J. Howard Marshall II." Pet. App. 28.

326 U.S. at 494) relied upon premises regarding the jurisdictional limitations on the English Court of Chancery in 1789, there is good reason to reject extension of *Sutton* beyond the particular factual settings to which it has been applied. Courts and commentators have noted that those premises are of "dubious * * * historical pedigree." *Dragan* v. *Miller*, 679 F.2d 712, 713 (7th Cir. 1982); see Peter Nicolas, *Fighting the Probate Mafia: A Dissection of the Probate Exception to Federal Court Jurisdiction*, 74 S. Cal. L. Rev. 1479, 1501-1503, 1546 (2001) ("The validity of the historical gloss on the statutory grant of subject matter jurisdiction to the federal courts is dubious."); John F. Winkler, *The Probate Jurisdiction of the Federal Courts*, 14 Prob. L.J. 77, 120-126 (1997); Gregory C. Luke & Daniel J. Hoffheimer, *Federal Probate Jurisdiction: Examining the Exception to the Rule*, 39 Fed. B. News & J. 579, 581 (1992) (noting that the probate exception is "a legal fiction based on an artificial interpretation of the Judiciary Act of 17[89]").

Whatever the scope of the chancery court's historic jurisdiction in probate matters, moreover, there can be no dispute that matters pertaining to trusts were traditionally the province of the courts of equity. See, *e.g.*, *Clews* v. *Jamieson*, 182 U.S. 461, 479 (1901); 3 William Blackstone, *Commentaries* *439 ("The form of *trust*, or second use, gives the courts of equity an exclusive jurisdiction as to the subject-matter of all settlements and devises in that form, and of all the long terms created in the present complicated mode of conveyancing."); 1 John Norton Pomeroy, *A Treatise on Equity Jurisprudence as Administered in the United States of America* § 151, at 206 (5th ed. 1941) ("The whole [trust] system fell within the exclusive jurisdiction of chancery; the doc-

trine of trusts became and continues to be the most efficient instrument in the hands of a chancellor.").[9] Thus, the court of appeals clearly erred in suggesting (Pet. App. 29-30) that the district court's "invalidation of the 1982 trust" (*id.* at 30) falls outside the proper jurisdiction of a federal court.

In short, the principle that federal courts lack jurisdiction "to probate a will" should be construed narrowly so as to preserve to the federal courts the jurisdiction granted them by Congress. Even assuming that suits seeking to set aside a state court's probate of a will can properly be relegated to state probate court, there is no basis for extending the *Sutton* analysis beyond its original bounds—*i.e.*, the establishment of a will or the annulment of an already-probated will—to encompass other matters, such as the enforcement, interpretation, or validity of inter vivos trusts.

C. The Ninth Circuit's Decision Is Inconsistent With *Markham*

The Ninth Circuit's cramped view of federal jurisdiction stems from its misreading of this Court's decision in *Markham* v. *Allen*, *supra*. Here, as it did in *Markham* itself, see *Allen* v. *Markham*, 147 F.2d 136, 136-137 (1945), rev'd, 326 U.S. 490 (1946), the Ninth Circuit has adopted an excessively broad view of the types of federal suits that interfere with ongoing state probate proceedings. The court of appeals apparently read *Markham* as delineating three factors, any one of which would be sufficient to deprive a federal court of otherwise proper

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[9] See also Nicolas, *supra*, at 1513-1514 ("In eighteenth-century England, the entire system of trusts was within the exclusive jurisdiction of chancery, and chancery would thus never refuse to adjudicate matters relating to trusts.") (footnotes omitted).

jurisdiction, even over a claim seeking merely an adjudication of rights in a decedent's estate. See Pet. App. 27-28 (citing *Markham*). The court of appeals' understanding of Markham is incorrect.

1. *Markham* was a federal suit brought on behalf of the United States by the Alien Property Custodian (Custodian) against an executor and six of the decedent's heirs, all of whom were American residents. 326 U.S. at 491-492. The Custodian claimed that, by virtue of the Trading with the Enemy Act, 50 U.S.C. App. 1 *et seq.*, the rights of the decedent's German legatees (to whom the decedent's will purported to leave her estate) vested in the Custodian, and the resident heirs therefore had "no interest in the estate." 326 U.S. at 492; *Allen* v. *Markham*, 147 F.2d at 136.

At the time the Custodian filed the federal suit, the decedent's estate was in the course of probate administration in state court. See *Markham*, 326 U.S. at 492; *Allen*, 147 F.2d at 136. In state court, the resident heirs were seeking a determination of heirship, claiming that they were entitled under California law to inherit the decedent's estate in lieu of the German legatees. See *Markham*, 326 U.S. at 492. Given that "the matter [was] within probate jurisdiction and [the probate] court [was] in possession of the property," the Ninth Circuit in *Allen* v. *Markham* reasoned that the probate court's "right to proceed to determine heirship cannot be interfered with by the federal court." 147 F.2d at 137.

This Court reversed. See *Markham*, 326 U.S. at 493-495. The Custodian's suit fell within the terms of the statute granting original federal jurisdiction over suits brought by "an officer of the United States" who was authorized to sue, *id.* at 493 (quoting 28 U.S.C. 41(1) (1940)), and the Court rejected the notion that the fed-

eral courts were nevertheless without jurisdiction. The Court did so based on "a long series of decisions of this Court" establishing that "federal courts of equity have jurisdiction to entertain suits in favor of creditors, legatees and heirs and other claimants against a decedent's estate to establish their claims so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court." *Id.* at 494 (quotation marks and citations omitted).

Significantly, the Court made clear that federal court adjudication of claimants' rights to property in a decedent's estate does *not* constitute that kind of interference:

> [W]hile a federal court may not exercise its jurisdiction to disturb or affect the possession of property in the custody of a state court, it may exercise its jurisdiction to adjudicate rights in such property *where the final judgment does not undertake to interfere with the state court's possession save to the extent that the state court is bound by the judgment to recognize the right adjudicated by the federal court.*

Markham, 326 U.S. at 494 (citations omitted and emphasis added). That is so even if proceedings are currently pending in state probate court to determine entitlement to the very same property. *Id.* at 495. Applying that standard in *Markham*, the Court concluded that the federal district court had jurisdiction to enter a judgment entitling the Custodian "to receive the net estate of the [decedent] in distribution, after the payment of expenses of administration, debts, and taxes." *Ibid.*

To be sure, *Markham* reaffirmed the principle that a federal court may "not interfere with the probate pro-

ceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court." 326 U.S. at 494; cf. Pet. App. 27-28 (announcing three-pronged test derived from latter phrase). But whatever the precise scope of that limitation on federal jurisdiction, see pp. 21-23, *infra*, the district court's judgment in this case appears to fall well within the scope of federal jurisdiction preserved by *Markham*. Indeed, it is far from clear that the judgment even purports to allocate rights to property in the decedent's estate. See Pet. App. 147 (concluding that petitioner "is entitled to judgment against [respondent] on her counterclaim for tortious interference with an inter vivos gift," and awarding her a specified amount of damages). In fact, the claim could be viewed as being premised on her lack of rights to that property. See *id.* at 166-167 ("[Petitioner's] counterclaim is at least in part premised on the theory that she is entitled to nothing either from the living trusts or from the estate itself. Her theory is that [respondent] prevented J. Howard, Sr. from including her in the living trusts."). But even if petitioner's claim is properly viewed as asking the federal courts to adjudicate her rights (if any) to property in the exclusive custody of the state probate court, *Markham* makes clear that there is no bar to federal jurisdiction. 326 U.S. at 494.

2. Properly read, the passage in *Markham* suggesting that the federal courts lack jurisdiction to "interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court," 326 U.S. at 494, does not create or reflect the existence of a special, extra-textual "probate exception" to federal jurisdiction. Rather, that passage was an attempt to encapsulate more than a cen-

tury of decisions founded upon the general principle that, when one court is exercising in rem or quasi in rem jurisdiction over a res, a second court will not assume in rem or quasi in rem jurisdiction over the same res. See, *e.g.*, *Penn Gen. Cas. Co.*, 294 U.S. at 195-196; *Waterman*, 215 U.S. at 43, 45-46; *Byers*, 149 U.S. at 614-615. Those decisions reflect the application of general principles of jurisdiction, not special rules of federal jurisdiction for probate-related matters.

For example, in *Byers*, the Court rejected an assertion of federal jurisdiction to enter a judgment "dispos[ing] of and distribut[ing] the entire estate" of a decedent and held that the federal court lacked jurisdiction to order the sale of specific property within the decedent's estate. 149 U.S. at 612-613, 620. The Court explained that such an order would "interfere with the administration of an estate in a state court," as "[n]o officer appointed by any court should be placed under the stress which rested upon this administrator, and compelled for his own protection to seek orders from two courts in respect to the administration of the same estate." *Id.* at 613. As the Court explained, "as in all other cases of conflict between jurisdictions of independent and concurrent authority, that which has first acquired possession of the res which is the subject of the litigation is entitled to administer it." *Id.* at 617 (citing, *e.g.*, *Williams* v. *Benedict*, 49 U.S. (8 How.) 107 (1850)).

That principle reflects a notion of first-in-time, not of state-court priority, and in any event is narrow in its scope and effect. Significantly, the Court in *Byers* upheld federal jurisdiction, as between diverse parties, "to determine and award their shares in the estate." 149 U.S. at 620. The Court made clear that such a judgment does not "interfere" with the state proceedings in the

relevant sense, as long as the judgment is not enforced directly against the property of the decedent. *Ibid.*; see pp. 10-11, *supra*. At most, that is the type of claim at issue here.[10]

Accordingly, the court of appeals' creation of an expansive "probate exception" to federal jurisdiction prevents the federal judiciary from exercising the jurisdiction granted to it by the Constitution and Congress and cannot be squared with this Court's precedent. Here, it is undisputed that Title 28 confers federal jurisdiction over petitioner's counterclaim against respondent as a claim arising under Title 11, or arising in or related to a case under Title 11. 28 U.S.C. 157, 1334; Pet. App. 21, 36 n.14 (court of appeals); *id.* at 172-173 (district court); *id.* at 193, 196-198 (bankruptcy court). The Ninth Circuit's sweeping exception should be rejected.

D. A Broad Probate-Related Exception To Federal Jurisdiction Would Be Particularly Unwarranted To The Extent That Congress Has Granted The United States A Federal Forum

Regardless of the rule that the Court adopts with respect to probate-related litigation between private parties, it would be particularly inappropriate to create

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[10] *Princess Lida of Thurn & Taxis* v. *Thompson*, 305 U.S. 456 (1939), on which respondent relies (Br. in Opp. 13), is not to the contrary. In that case, the Court held that where an inter vivos trust was currently being administered by a state court in an in rem proceeding, a federal court could not subsequently take in rem jurisdiction to administer that same trust. 305 U.S. at 463-466. While concluding that the claims sought to be pressed in federal court in that case were "solely as to administration and restoration of corpus," the Court declared that "an action in the federal court to establish the validity or the amount of a claim constitutes no interference with a state court's possession or control of a res." *Id.* at 467.

a broad "probate exception" to federal jurisdiction in cases to which the United States is a party. As scholarly commentators have noted, federal jurisdiction to hear suits by and against the United States is "one of the traditional prerogatives of sovereignty." Erwin Chemerinsky & Larry Kramer, *Defining the Role of the Federal Courts*, 1990 B.Y.U. L. Rev. 67, 80. Congress has expressly exercised that prerogative by providing a federal forum, either through original or removal jurisdiction, for the resolution of most disputes involving the United States. See, *e.g.*, 28 U.S.C. 1340, 1345-1347, 1442, 1444, 2410. The availability of that federal forum should not be frustrated by a broad, judicially-created exception to federal jurisdiction that finds no support in the statutory text.

1. Not surprisingly, probate-related claims brought by and against the United States often involve disputes over federal tax liability. See notes 1-2, *supra*. Through specific grants of jurisdiction in Title 28, Congress has expressed a policy that the United States should generally be able to litigate such claims in federal court. For example, Section 1340 confers original jurisdiction over "any civil action arising under any Act of Congress providing for internal revenue," and Section 1346 confers original jurisdiction for suits against the United States for the recovery of taxes or penalties alleged to have been erroneously or illegally collected. See 28 U.S.C. 1340, 1346(a)(1). Section 1442 authorizes removal to federal court when the United States is sued in state court on account of any right, title, or authority claimed under any federal tax statute. See 28 U.S.C. 1442(a)(1). Under Section 1444, the United States may also remove to federal court any actions, such as quiet title claims, brought against it under Section 2410 with respect to

property on which the United States has a tax or other lien. See 28 U.S.C. 1444, 2410. And Section 1345 allows the United States as plaintiff to commence any "civil actions, suits or proceedings" in federal court. 28 U.S.C. 1345.

The tax context aptly demonstrates the importance of a federal forum for claims by and against the United States. Indeed, just last Term, this Court held that "the national interest in providing a federal forum for federal tax litigation [was] sufficiently substantial to support the exercise of federal question jurisdiction" in a quiet title action between private parties. *Grable & Sons Metal Prods., Inc.* v. *Darue Eng'g & Mfg.*, 125 S. Ct. 2363, 2365 (2005). That national interest is particularly weighty in the context of tax-related litigation to which the United States is a party, and it would be frustrated by the application of the court of appeals' probate-related exception to federal jurisdiction in such cases.

As this Court repeatedly has recognized, "[t]he Government has a strong interest in the 'prompt and certain collection of delinquent taxes.'" *Grable & Sons*, 125 S. Ct. at 2368 (quoting *United States* v. *Rodgers*, 461 U.S. 677, 709 (1983)).[11] As an initial matter, therefore, the United States has an interest in avoiding the procedural and substantive vagaries of 50 different state court systems as they might apply to probate-related federal tax litigation.

The availability of a federal forum is important to the United States without regard to whether the particular case turns on questions of federal or state law. It is self-

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[11] Accord *United States* v. *National Bank of Commerce*, 472 U.S. 713, 733 (1985); *Franchise Tax Bd.* v. *USPS*, 467 U.S. 512, 523 (1984); *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 350 (1977); *Perez* v. *Ledesma*, 401 U.S. 82, 127 n.17 (1971).

evident that important questions of federal law "sensibly belong[] in a federal court," *Grable & Sons*, 125 S. Ct. at 2368, and federal judges may be more familiar than state probate judges with the governing law. See *ibid.* This Court also has recognized, however, the importance to the United States of a federal forum with respect to state law matters. As the Court explained in *Arizona* v. *Manypenny*, 451 U.S. 232 (1981), the purpose of removal jurisdiction in cases in which the United States or one of its officers is a party is to "permit[] a trial upon the merits of the state-law question free from local interests or prejudice." *Id.* at 242; accord *Maryland* v. *Soper*, 270 U.S. 9, 32 (1926). That consideration may have special force in the context of litigation relating to the collection of federal tax revenues, especially when state law determines whether property will stay in the local community or end up in the federal fisc.

2. Even if the Court were to recognize a "probate exception" to federal jurisdiction for purposes of litigation between private parties, the unique federal interest in preserving a federal forum for litigation involving the national government would preclude application of any such exception to cases in which the United States is a party. In related contexts, the Court has developed special rules for the United States in light of the national government's unique interests and roles, and the same result would be appropriate with respect to any "probate exception."

For example, the Court has construed the Anti-Injunction Act, 28 U.S.C. 2283, to incorporate an implicit exception for injunctions sought by the United States against state court proceedings. *NLRB* v. *Nash-Finch Co.*, 404 U.S. 138, 144-146 (1971); *Leiter Minerals, Inc.* v. *United States*, 352 U.S. 220, 224-226 (1957). In so

doing, the Court characterized the United States as having "superior federal interests." *Nash-Finch Co.*, 404 U.S. at 145; *Leiter Minerals*, 352 U.S. at 226. The Court observed that the policy behind the Anti-Injunction Act "is much more compelling when it is the litigation of private parties which threatens to draw the two judicial systems into conflict than when it is the United States which seeks a stay to prevent threatened irreparable injury to a national interest." *Leiter Minerals*, 352 U.S. at 225-226.

Special rules also exist for the United States in the tax context. For example, in *Commissioner* v. *Estate of Bosch*, 387 U.S. 456, 457 (1967), this Court considered "what effect must be given a state trial court decree where the matter decided there is determinative of federal estate tax consequences," and the United States was not a party to the proceeding. *Id.* at 462. The Court held that "where the federal estate tax liability turns upon the character of a property interest held and transferred by the decedent under state law, federal authorities are not bound by the determination made of such property interest by a state trial court." *Id.* at 457.

Accordingly, whatever rule is adopted with respect to private parties, the creation of a broad "probate exception" applicable to cases in which the United States is a party would be unwarranted. Such a rule would thwart Congress's intent to provide federal jurisdiction for claims by and against the United States. As the district court recognized in *In re Palmer's Will*, 11 F. Supp. 301 (E.D. Okla. 1935), in upholding its jurisdiction to hear a will contest that the United States had removed to federal court:

> [I]t was also the intention of Congress that when the United States government was brought in that it

> should have the privilege of having all essential adjudications made by removal in the national courts. To say that these statutes are to receive such construction that in cases involving succession through wills or inheritance, that as to probating of the wills and determination of heirship, * * * the state tribunals should have exclusive jurisdiction, in such matters, * * * does not appear to be in accord with the purpose or intention of the act.

Id. at 304. The district court's reasoning is as valid today as it was in 1935.

E. Even When Federal Jurisdiction Exists, Federal Courts May Have Discretion To Refrain From Exercising Jurisdiction

As this Court suggested in *Markham*, 326 U.S. at 495, there may be certain limited instances in which federal courts should refrain from exercising jurisdiction in probate-related matters. Whatever the limits of such discretion with respect to litigation between private parties, however, *Markham* makes clear that any such discretion would rarely be appropriate when the United States is a party. The Court stressed that the Trading with the Enemy Act's jurisdictional grant "plainly indicate[d] that Congress has adopted the policy of permitting the custodian to proceed in the district courts to enforce his rights under the Act, whether they depend on state or federal law." 326 U.S. at 496. The provisions of Title 28 granting original and removal jurisdiction over cases to which the United States is a party reflect a similar policy.[12]

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[12] To be sure, *Colorado River*, *supra*, involved a case to which the United States was a party and the Court concluded that the federal court should have refrained from exercising jurisdiction. But the

In this case, however, there is no need to consider whether and when district courts may have the discretion to abstain from exercising otherwise proper jurisdiction. In the provision granting jurisdiction over bankruptcy matters, Congress delineated precisely when bankruptcy courts may or must abstain from exercising the jurisdiction granted to determine state law claims. See 28 U.S.C. 1334(c)(1) and (2). Whatever the proper application of those provisions in this case,[13] the fact that Congress specifically considered the possibility of concurrent state proceedings, and their effect on the bankruptcy court's exercise of its jurisdiction, makes the creation of a further judicial exception to such jurisdiction even more unjustified.[14]

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principle of *Colorado River* applies only in "exceptional circumstances." *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 14-15 (1983) (quoting *Colorado River*, 424 U.S. at 813). Moreover, as this Court made clear in *Moses H. Cone*, "[b]y far the most important factor" in *Colorado River* was that Congress had expressed a clear federal policy against piecemeal litigation of water rights. *Moses H. Cone*, 460 U.S. at 16. No comparable federal policy exists with respect to probate matters. Indeed, *Colorado River* dismissal would be especially inappropriate when the United States is seeking adjudication of federal tax liability: in *Moses H. Cone*, this Court stressed that "the presence of federal-law issues must always be a major consideration weighing against surrender" of federal jurisdiction. *Id.* at 26. See *United States* v. *Bank of New York & Trust Co.*, 296 U.S. 463 (1936).

[13] The district court (C.A. Supp. E.R. 8593-8599) and the bankruptcy court (Pet. App. 196) declined to abstain under these provisions, and the court of appeals did not address the issue.

[14] Respondent relies (*e.g.*, Br. in Opp. 21-22) upon *Harris* v. *Zion's Sav. Bank & Trust Co.*, 317 U.S. 447 (1943), for the proposition that the "probate exception" applies to federal bankruptcy jurisdiction, but *Harris* did not involve the application of a "probate exception" to otherwise applicable jurisdiction. Rather, it involved a statutory interpretation question as to the meaning of a provision in the

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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bankruptcy law. See *id.* at 449-453.

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Supreme Court of the United States

VICKIE LYNN MARSHALL,

Petitioner,

—v.—

E. PIERCE MARSHALL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN SUPPORT OF PETITIONER FOR *AMICI CURIAE* PROFESSORS RICHARD AARON, JAGDEEP S. BHANDARI, SUSAN BLOCK-LIEB, RALPH BRUBAKER, ERWIN CHEMERINSKY, ROBERT D'AGOSTINO, S. ELIZABETH GIBSON, ROBERT M. LAWLESS, CHARLES MOONEY, C. SCOTT PRYOR, NANCY RAPOPORT, ROBERT K. RASMUSSEN, KEITH SHARFMAN, ETTIE WARD AND ROBERT M. ZINMAN

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Other Authority:

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INTEREST OF AMICI CURIAE[1]

The *Amici Curiae* are law professors who have devoted their careers to the study and teaching of bankruptcy law and bankruptcy jurisdiction.[2] They are deeply interested in this case because of the important effect its outcome could have on the scope of bankruptcy jurisdiction. The *Amici* file this *pro bono* brief to offer what assistance they can to the Court as it considers and decides whether the broad and unqualified jurisdiction specially conferred by Congress on the courts of bankruptcy is cut down by the judicially-created probate exception so as to exclude from their jurisdiction any matter that might affect a decedent's legatees or heirs.

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[1] This brief has been prepared *pro bono*. Pursuant to Rule 37 of the Rules of this Court, the *Amici* file this brief with the written consent of both parties, which are on file with the Clerk. No counsel for a party authored this brief in whole or in part. No person or entity including *Amici* or their counsel made a monetary contribution for the preparation or submission of this brief.

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In supporting Petitioner and seeking reversal of the decision of the Circuit Court, the *Amici* urge the Court to hold that the probate exception does not limit the bankruptcy jurisdiction broadly conferred by 28 U.S.C. § 1334, and that the bankruptcy-related abstention provisions in 28 U.S.C. § 1334(c), which include the role of state courts and state law among its relevant abstention considerations, govern the circumstances in which bankruptcy jurisdiction shall not be exercised. This brief focuses on the issue by emphasizing the special nature of the bankruptcy jurisdiction and abstention statutes, whereas the Circuit Court viewed this bankruptcy case from the vantage point of a decedent's heirs and legatees and state probate courts.

SUMMARY OF ARGUMENT

This is a bankruptcy case. The issue posed is whether the judicially-crafted probate exception nullifies a portion of the unqualified bankruptcy jurisdiction conferred by Congress on the courts of bankruptcy under 28 U.S.C. § 1334(b) and (e). This bankruptcy case should not be decided by focusing on a decedent's estate. As the Circuit Court itself recognized, "this case does not involve the administration of an estate, the probate of a will, or any other purely probate matter . . . ." 392 F.3d at 1133. Nor would the judgment granted by the District Court (the "court of bankruptcy") in the exercise of its bankruptcy jurisdiction and voided by the Circuit Court, have been enforceable against the estate of the Petitioner's deceased husband, but only against the defendant, who is her stepson and the Respondent herein.

The court of bankruptcy below, exercising its bankruptcy jurisdiction, granted an approximate $88 million judgment to the Petitioner-Debtor (the "Debtor") on her

claim against Respondent for his tortious interference with her expectancy of an *inter vivos* gift from her husband, only to be vacated on the basis of the Circuit Court's holding that the probate exception removed the Debtor's tort claim from the broad and unqualified statutory bankruptcy jurisdiction conferred by Congress.

Although the Circuit Court stated that it was only "incidentally . . . required to determine whether the probate exception applies in a bankruptcy case," 392 F.3d at 1121, the central issue in this case involves whether the probate exception cancels a portion of the bankruptcy jurisdiction conferred by Congress on the courts of bankruptcy, not the role of state probate courts or state probate law. Moreover, although this was a bankruptcy case, the Circuit Court did not even review the District Court's order dated July 20, 2001 denying Respondent's motion for abstention predicated on 28 U.S.C. § 1334(c)(1) and (2),[3] although it could have reviewed the denial of his subsection (c)(2) motion on his appeal from the final judgment.[4] Instead, the Circuit Court addressed, as the only question, whether the probate exception cut out a portion of the unqualified bankruptcy jurisdiction conferred by 28 U.S.C. § 1334. As stated by the Circuit Court, "[o]ur

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[3] The District Court's order denying abstention pursuant to 28 U.S.C. § 1334(c) is in the Supplemental Excerpts of the Record of the Ninth Circuit, at 8593.

[4] By virtue of 28 U.S.C. § 1334(d), the District Court's order denying § 1334(c)(1) abstention was not subject to review by the Circuit Court, whereas the limitation on its appellate jurisdiction by that provision did not apply to the denial of § 1334(c)(2) abstention. In any event, because Respondent did not contend in the Ninth Circuit briefing that the District Court's ruling on abstention was erroneous, the issue was waived. *TRW, Inc. v. Andrews*, 534 U.S. 19, 34 (2001); *Confederated Tribes of Umatilla Indian Reservation v. Bonneville Power Administration*, 342 F.3d 924, 933 (9th Cir. 2003).

jurisdiction on the merits depends upon whether the probate exception to federal court jurisdiction applies," 392 F.3d at 1121, and it held that bankruptcy jurisdiction conferred by 28 U.S.C. § 1334 succumbed to the probate exception.

By holding that the probate exception placed the Debtor's tort claim outside the jurisdiction of the court of bankruptcy, the Circuit Court brought a concept into 28 U.S.C. § 1334 that is nowhere in that statute, and read § 1334 as if it automatically excluded a portion of the jurisdiction it conferred. This invaded the province of Congress by judicially amending the bankruptcy jurisdictional statutes to narrow their scope. Without even mentioning the bankruptcy abstention provisions in 28 U.S.C. § 1334(c), the Circuit Court addressed, as the only question, whether the probate exception cut out a portion of the unqualified bankruptcy jurisdiction conferred by § 1334(b) and (e).

Amici proffer several reasons explaining why the probate exception does not apply to this and other cases within the jurisdiction conferred by 28 U.S.C. § 1334 on the courts of bankruptcy.

First, the plain text of § 1334(b) and (e) broadly grants jurisdiction of the Debtor's tortious interference claim because it is "related to" her bankruptcy case, and also consists of "property of the estate," which includes a debtor's causes of action. None of the language of § 1334 or of any other statute provides a basis for reading out of the statute any of the jurisdiction so conferred. Thus, with its decision, the Circuit Court essentially repealed part of the bankruptcy statute when it applied the probate exception to bankruptcy.

Second, the principle of *Markham v. Allen*, 326 U.S. 490, 495 (1946), is controlling. In that case, the probate

exception was held not to impair the district court's jurisdiction *specially* granted by a specific federal statute even thought the decedent's estate was undergoing administration in a probate court. Under the Court's analysis, the probate exception, developed under the diversity jurisdiction statute conferring jurisdiction generally on the district courts, could not be read to limit the district court's specially conferred jurisdiction pursuant to the Trading With the Enemy Act. Likewise, 28 U.S.C. § 1334 is a special jurisdictional statute; it grants broad bankruptcy jurisdiction as a means to accomplish the purposes of the bankruptcy law.

Third, although a federal court has an unflagging duty to exercise its jurisdiction, and not to abstain in the absence of exceptional circumstances that may exist in a particular case, a court of bankruptcy, in deciding whether to abstain from hearing a proceeding within its jurisdiction, is not limited to examining bankruptcy considerations. Section 1334(c)'s abstention provisions contemplate that the court give consideration to numerous factors, including the interest of the debtor and creditors, as well as the administration of a decedent's estate for the benefit of its legatees and heirs. Accordingly, the probate exception, concerned with one factor only, has no place in the bankruptcy context in which the courts of bankruptcy are guided by many considerations in deciding whether to abstain.

Fourth, the goals of bankruptcy, to centralize bankruptcy litigation and to maximize the debtor estate for the benefit of the creditors, guide the interpretation of § 1334. The cancellation by the Circuit Court of a portion of the bankruptcy jurisdiction conferred by Congress by means of the probate exception interferes with Congress' purpose in creating broad bankruptcy juris-

diction and its intention that all property of the debtor be brought into the estate.

Fifth, a party who invokes bankruptcy jurisdiction cannot thereafter seek to void it. Respondent filed both a proof of claim and an adversary proceeding against the Debtor in this bankruptcy case. By so proceeding, Respondent invoked bankruptcy jurisdiction as a means to contest her position and to challenge her right to receive a discharge in bankruptcy. In response, the Debtor filed a counterclaim against Respondent for tortious interference with her expectancy of an *inter vivos* gift. Having invoked the jurisdiction of a court of bankruptcy by an action in which the Debtor counterclaimed, Respondent cannot thereafter assert that the court of bankruptcy could no longer exercise its statutory jurisdiction.

ARGUMENT

I. A PLAIN TEXT READING OF 28 U.S.C. § 1334 DEMONSTRATES THAT THE PROBATE EXCEPTION IS INAPPLICABLE IN THE BANKRUPTCY CONTEXT.

28 U.S.C. § 1334(b) grants to the courts of bankruptcy non-exclusive jurisdiction of "all civil proceedings arising under title 11, or arising in or related to cases under title 11," and 28 U.S.C. § 1334(e) confers exclusive jurisdiction on such courts of all "property of the estate."[5] Upon the commencement of a bankruptcy case,

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[5] On April 20, 2005, the date of enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (119 Stat. 98), 28 U.S.C. § 1334 was amended by that Act by adding subsection (e)(2) and a reference to (e)(2) in subsection (b). Subsection (e)(1) maintains the substance of former (e), which continues to apply to this pre-April 20, 2005 case because it was commenced before such date. The effective date provision is set forth in Pub. L. No. 109-8,

11 U.S.C. § 541 provides for the creation of an estate, broadly extending to all "legal or equitable interests of the debtor," including causes of action of the debtor. *See* H.R. REP. NO. 95-595, at 367 (1977) ("[S]ection [541] defines property of the estate, and specifies what property becomes property of the estate . . . . It includes all kinds of property, including tangible or intangible property [and] *causes of action*.") (emphasis added). Proceedings on a debtor's cause of action are obviously "related to" the estate, and thus fall within this jurisdictional grant, *see Celotex Corp. v. Edwards*, 514 U.S. 300, 308 n.5 (1995), and as "property of the estate," such proceedings are within the exclusive jurisdiction conferred on the courts of bankruptcy by § 1334(e).

The question then is whether the pervasive scope of these bankruptcy jurisdictional statutes will be broadly read as written, or instead narrowed by implying an exception.

Determining the meaning of a statute requires a court first to address the language of the statute for its plain meaning. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) (citing *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985)). This Court has specifically recognized on several occasions that when "the statute's language is plain, the sole function of the courts-at least where the disposition required by the text is not absurd-is to enforce it according to its terms." *Hartford Underwriters Insurance Co. v. Union Planters*

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§ 324(a)(2), (b), 119 Stat. 98, 216 (2005). The purpose of the amendment is to prevent a court of bankruptcy from abstaining from hearing claims such as malpractice claims against bankruptcy professionals, so that they may be tried before the bankruptcy judges who authorized their appointment, instead of before a state court jury. *See* Kenneth N. Klee, The Bankruptcy Abuse Prevention & Consumer Protection Act of 2005-Business Bankruptcy Amendments, SK092 ALI-ABA (2005).

Bank, N.A., 530 U.S. 1, 6 (2000) (citing *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. at 241, quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)).

It takes no more than a plain reading of § 1334(b) and (e) to reach the conclusion which comports with the reading of § 1334 urged by *Amici*: There is no room in the plain text of § 1334 to restrict or to limit the jurisdiction of the courts of bankruptcy by engrafting a probate exception onto the statute. Congress explicitly provided in § 1334 that courts of bankruptcy are to have broad and comprehensive jurisdiction: First, under § 1334(e), courts of bankruptcy are to have "exclusive" jurisdiction "of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate . . . ." 28 U.S.C. § 1334(e). The Debtor's tort claim is "property of the estate" within the meaning of both 28 U.S.C. § 1334 and 11 U.S.C. § 541. Second, congressional intent is obvious from the broad and comprehensive jurisdiction conferred on courts of bankruptcy by the plain language of § 1334(b): ". . . the [courts of bankruptcy] shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in *or related to* cases under title 11." 28 U.S.C. § 1334(b) (emphasis added).

There is no indication that Congress intended to limit or restrict this broad grant of jurisdiction by a judicial doctrine such as the probate exception. Indeed, in enacting America's first bankruptcy law, the Bankruptcy Act of 1800 (2 Stat. 19-36), Congress gave no hint that it intended to limit the specially conferred bankruptcy jurisdiction by the probate exception. Nor did Congress give any such hint in any of its subsequent bankruptcy acts, enacted in 1841 (5 Stat. 440), 1867 (14 Stat. 517), 1898 (30 Stat. 544, 545), 1938 (52 Stat. 840), 1978 (92 Stat. 2549), or the statute applicable to this case, enacted in 1984 (98 Stat. 333).

The probate exception should not be applied as a limitation on bankruptcy jurisdiction because that would undercut the administration of bankruptcy cases and application of the bankruptcy law by the courts of bankruptcy. For example, the probate exception, if applicable to bankruptcy, could bar a bankruptcy trustee's proceeding in a court of bankruptcy to recover a fraudulent conveyance or voidable preference received by a transferee of property who thereafter dies, or could impair the enforcement of the automatic stay under 11 U.S.C. § 362 by a court of bankruptcy against an executor or heir of an estate in administration.

Respondent asks the Court to read the judicially-created probate exception into § 1334 as a limitation, although no restriction exists in the language of the statute. *Amici* urge this Court, therefore, to enforce the terms of § 1334 as written by Congress, and to hold that the probate exception did not bar the courts of bankruptcy from exercising their § 1334 jurisdiction of the Debtor's tort claim.

II. UNDER THE THEORY OF *MARKHAM V. ALLEN*, THE PROBATE EXCEPTION IS INAPPLICABLE BECAUSE 28 U.S.C. § 1334 "SPECIALLY CONFERS" JURISDICTION ON THE COURTS OF BANKRUPTCY.

A. The Probate Exception Has No Place in the Context of Bankruptcy Jurisdiction.

The probate exception has not been addressed by this Court since the seminal case of *Markham v. Allen*, 326 U.S. 490 (1946), an action against the executor of an estate in administration in a state probate court and the decedent's heirs. In *Markham v. Allen*, the district court, pursuant to its specially conferred jurisdiction under the

Trading With the Enemy Act, granted a judgment declaring that the Custodian under that Act, rather than the decedent's heirs, was to receive the net proceeds of the decedent's estate. *Id.* at 495. Reversing the Ninth Circuit, this Court affirmed the judgment, reasoning that because the Trading With the Enemy Act specially conferred jurisdiction on the district court for suits grounded on the provisions of that Act "independently of the statutes governing generally jurisdiction of the federal courts," *id.* at 495, the probate exception was not applicable to limit such specially granted jurisdiction.

Similarly, under the theory of *Markham v. Allen*, the probate exception is inapplicable to an action within the specially conferred jurisdiction of the courts of bankruptcy. Section 1334 is clearly a special grant of jurisdiction by Congress, intending to establish the paramount nature of bankruptcy jurisdiction. *See New Haven Inclusion Cases*, 399 U.S. 392, 426 (1970) (establishing the "primary jurisdiction in the reorganization court[s]"); *United States Fidelity & Guaranty Co. v. Bray*, 225 U.S. 205, 217 (1912) ("[I]t is a necessary conclusion . . . that the jurisdiction of the [courts of] bankruptcy is intended to be exclusive of all other courts . . . ."). In this case, as in *Markham v. Allen*, the Ninth Circuit erred by engrafting a limitation on the exercise of jurisdiction instead of adhering to the special bankruptcy jurisdictional provisions enacted by Congress. Moreover, the judgment entered in the Debtor's favor had no more impact on "probate jurisdiction [or] property in the possession or custody of a state court," 326 U.S. at 495, than did the judgment sustained in *Markham v. Allen*. The judgment should be reinstated.

B. Congress Did Not Intend to Abrogate the Theory of *Markham v. Allen* When It Enacted 28 U.S.C. § 1334.

Congress granted pervasive bankruptcy jurisdiction to the courts of bankruptcy in order "that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate" in a centralized forum. *Celotex Corp. v. Edwards*, 514 U.S. at 308, citing *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984). Congress envisioned a "more uniform, cohesive body of substantive and procedural law," so as to "greatly diminish the bases for litigation of jurisdictional issues . . . ." H.R. REP. NO. 95-595, at 46 (1977). Congress thus conferred on the courts of bankruptcy "broad and complete jurisdiction over all matters and proceedings that arise in connection with bankruptcy cases." *Id.* at 48; *see, e.g.*, *In re Dow Corning Corp.*, 86 F.3d 482, 489 (6th Cir. 1996). This was also critical to accomplishing a central purpose of bankruptcy, namely to maximize the debtor estate for the benefit of the creditors.

Congress recognized the need for a bankruptcy court to have its jurisdiction "substantially expanded" from that under the Bankruptcy Act of 1938 (52 Stat. 840). H.R. REP. NO. 95-595, at 13 (1977). This enhanced jurisdiction included the creation of a separate non-Article III court of bankruptcy with pervasive jurisdiction. *See* former 28 U.S.C. § 1471 (predecessor to 28 U.S.C. § 1334). After § 1471 was declared unconstitutional in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), the jurisdictional provisions of the courts of bankruptcy were rewritten in 28 U.S.C. § 1334 so as to vest bankruptcy jurisdiction in the Article III district courts. Significantly, consistent with the historically broad grant of jurisdiction to the courts

of bankruptcy, § 1334 grants broad and comprehensive jurisdiction to the courts of bankruptcy.

It is clear from a plain reading of § 1334, its congressional history, and this Court's jurisprudence, that Congress' basic purpose in enacting § 1334 was to confer broad jurisdiction on the courts of bankruptcy and not to abrogate the theory of *Markham v. Allen* by applying the probate exception as a limitation on the special bankruptcy jurisdictional legislation enacted in 1978 and again in 1984.

Had Congress intended to limit or restrict the broad grant of jurisdiction in § 1334 by a probate exception, it would have specifically covered the probate area of special interest under state law, as it did with numerous subjects of state-law concern in a number of provisions in the bankruptcy law. Indeed, Congress has legislated in special areas of state interest within the Bankruptcy Code, for example, specifically in matters relating to the domestic relations. *See* 11 U.S.C. § 362(b)(2)(A), (B) and (C), and § 523(a)(5) and (15). Moreover, 11 U.S.C. § 362(b)(2) provides an exception to the automatic stay for actions to establish paternity, to establish domestic support obligations, and regarding other matters of state interest in domestic relations. Thus, several provisions of the Bankruptcy Code recognize and allow state actions involving certain areas of special state interest to proceed in a non-bankruptcy court notwithstanding a pending bankruptcy, where otherwise such actions would violate the automatic stay provisions of 11 U.S.C. § 362. Congress knew how to write an exception into bankruptcy legislation when it intended to do so. Congress could thus have written a probate exception into § 1334 if it intended to do so. Because it did not do so, such an exception should not be implied.

Amici urge the Court to apply the theory of *Markham v. Allen* and to hold that the Ninth Circuit erred when it ruled that the probate exception stripped the court of bankruptcy of jurisdiction to hear the Debtor's suit.

III. The Bankruptcy-Related Provisions for Abstention from the Exercise of Specially Conferred Bankruptcy Jurisdiction Are Controlling.

Pursuant to 28 U.S.C. § 1334(c)(1), a court of bankruptcy may, "in the interest of justice, or in the interest of comity with State courts or respect for State law," abstain from hearing a proceeding "arising under title 11 or arising in or related to" a debtor's bankruptcy case. Even though a debtor's cause of action asserted in a court of bankruptcy may have common facts with proceedings in a probate court, abstention by the bankruptcy court should not be automatic. Rather than have the exercise of its jurisdiction immediately blocked by the probate exception, the question of whether a court of bankruptcy should exercise its jurisdiction should first be heard and determined by that court pursuant to § 1334(c)'s provisions and its abstention standards developed thereunder by the courts. Providing for abstention under the principles and factors developed under the bankruptcy legislation is vastly different from construing bankruptcy jurisdiction to be automatically limited by an implied exception.

In deciding whether to abstain under § 1334(c)(1) from exercising its specially conferred jurisdiction, the courts, notably the Court of Appeals for the Ninth Circuit in *In re Tucson Estates, Inc.*, 912 F.2d 1162 (9th Cir. 1990), have developed many factors to be considered, including

> (1) the effect or lack thereof on the efficient administration of the estate if a Court recommends abstention, (2) the extent to which state law issues predominate over bankruptcy issues, (3) the difficulty or unsettled nature of the applicable law, (4) the presence of a related proceeding commenced in state court or other nonbankruptcy court, (5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334, (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case, (7) the substance rather than form of an asserted "core" proceeding, (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court, (9) the burden of [the bankruptcy court's] docket, (10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties, (11) the existence of a right to a jury trial, and (12) the presence in the proceeding of nondebtor parties.

Id. at 1167 (ruling abstention proper after consideration of 12 factors); *see also In re Eastport Associates*, 935 F.2d 1071, 1079 (9th Cir. 1991) (upholding decision not to abstain because "factors regarding the administration of the bankruptcy estate outweighed the interest in deferral to state courts").

The bankruptcy abstention provisions and the factors developed thereunder leave ample room for consideration of state law issues and state court concerns. In deciding whether to abstain under § 1334(c)(1), however, courts of bankruptcy are likely to decline to probate wills or to administer a decedent's estate.

In contrast to permissive abstention under § 1334(c)(1), under limited circumstances mandatory abstention pursuant to § 1334(c)(2) is required as to a state law cause

of action, but only if, as provided in that subsection, the party seeking abstention has made a motion for abstention. Like subsection (c)(1), subsection (c)(2) does not operate automatically. Subsection (c)(2) provides for abstention only if its many preconditions are present, including that, in addition to the requirement of filing a motion for abstention, the cause of action did not arise under title 11 or in a case under title 11, and that among other things, there be an absence of federal jurisdiction other than under § 1334, a pending action in state court having jurisdiction of the cause of action in suit, as well as the availability of a timely adjudication in the state court which does not interfere with the orderly administration of the debtor estate.

In this case, the Respondent moved for abstention under both subsections (c)(1) and (c)(2) in the Bankruptcy Court, and again in the District Court, and both courts of bankruptcy denied his abstention motions. Although Respondent's subsection (c)(1) motion was not reviewable in the Circuit Court because of 28 U.S.C. § 1334(d), he could have sought review by that court of his subsection (c)(2) motion. Moreover, instead of dealing with the denial of Respondent's abstention motion made pursuant to § 1334(c)(2) and addressing whether abstention was improperly denied under the factors the Circuit Court itself carefully delineated in its own decision in *Tucson Estates*, 912 F.2d at 1167, the Circuit Court reversed the judgment issued below by holding that the probate exception applied to bankruptcy and automatically voided the judgment. The Circuit Court did not consider § 1334(c) to be part of the case, and its only decision was to hold that the court of bankruptcy lacked jurisdiction because of the probate exception. As the Circuit Court saw it: "Our jurisdiction on the merits depends upon whether the probate exception to federal

court jurisdiction applies to the claims [asserted by the Debtor] in a bankruptcy case." 392 F.3d at 1121.

Moreover, the fact that § 1334(e) confers exclusive jurisdiction of "property of the estate," which includes the debtor's cause of action against Respondent, does not preclude abstention by a court of bankruptcy pursuant to § 1334(c). This is because § 1334(c) provides that nothing in § 1334 prevents abstention by a court of bankruptcy. As discussed elsewhere, however, the grant of exclusive jurisdiction by § 1334(e) reinforces the conclusion that the probate exception does not apply in bankruptcy. *See* Section IV at pages 17-20 *infra*.

Automatic abstention has never been the approach of the courts in bankruptcy cases. This Court has long recognized that a court of bankruptcy should abstain from exercising its jurisdiction only in the most exceptional of circumstances. *See Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478, 483 (1940) (abstaining due to presence of unique question of real property law), cited in H.R. REP. NO. 95-595, at 51 (1977), and *Mangus v. Miller*, 317 U.S. 178, 186 (1942) (stating same); *see also Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 25-26 (1983) ("[O]ur task in cases such as this is not to find some substantial reason for the exercise of federal jurisdiction by the district court; rather, the task is to ascertain whether there exist 'exceptional' circumstances, the 'clearest of justifications,' that can suffice under *Colorado River* to justify the *surrender* of that jurisdiction."); *cf. Meredith v. Winter Haven*, 320 U.S. 228, 234-35 (1943) ("When such exceptional circumstances are not present, denial of th[e] opportunity [to have rights adjudicated] by the federal courts merely because the answers to the questions of state law are difficult or uncertain or have not yet been

given by the highest court of the state, would thwart the purpose of the jurisdictional act.").

While the Court has not addressed the issue of abstention under § 1334(c), it is well established that abstention is a step that should generally be taken only with great reluctance. As stated in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), "[a]bstention from the exercise of federal jurisdiction is the exception, not the rule." *Id.* at 813. This is because of "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Id.* at 817. The notion that a court must take jurisdiction if it is granted to it has been prevalent since the Court's decision in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821). There, the Court aptly stated: "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution." *Id.* at 404. A rule such as the probate exception that removes a portion of the jurisdiction specially conferred by Congress on the courts of bankruptcy is inconsistent with this fundamental approach.

IV. THE PARAMOUNT JURISDICTION OF THE COURTS OF BANKRUPTCY, BY VIRTUE OF THEIR EXCLUSIVE *IN REM* JURISDICTION UNDER § 1334(e), REINFORCES THE BASIC NOTION THAT ABSTENTION IS THE EXCEPTION RATHER THAN THE RULE.

Section 1334(e) confers "exclusive" jurisdiction of "property of the estate" on the courts of bankruptcy. The Court has repeatedly recognized that bankruptcy is an *in rem* proceeding. *See e.g., Hanover Bank v. Moyes*, 186 U.S. 181, 191-92 (1902); *Bailey v. Baker Ice Machine Co.*, 239 U.S. 268, 275-76 (1915); *Gardner v. New Jer-*

sey, 329 U.S. 565, 574 (1947); *Katchen v. Landy*, 382 U.S. 323, 329 (1966). The Court has recognized that the *res* includes the debtor's assets or the bankruptcy "estate," *Gardner*, 329 U.S. at 574, as well as the debtor's status, *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 448 (2004) ("A proceeding regarding the discharge of a debt by a bankruptcy court is similarly an *in rem* proceeding.").

"This jurisdiction [of courts of bankruptcy] is exclusive within the field defined by the law, and is so far *in rem* that the estate is regarded as *in custodia legis* from the filing of the petition." *See Straton v. New*, 283 U.S. 318, 321 (1931) (citing *Acme Harvester Co. v. Beekman Lumber Co.*, 222 U.S. 300 (1911)). This concept is carried into the current bankruptcy jurisdictional provisions by 28 U.S.C. § 1334(e)'s grant of exclusive jurisdiction of property of the estate.

In this case, the Debtor's counterclaim for tortious interference was a *res* subject to the *in rem* jurisdiction of the court of bankruptcy within its § 1334(e) exclusive jurisdiction. As such, the court of bankruptcy was permitted to adjudicate this claim and any defenses thereto asserted by Respondent. *See Tennessee Student Assistance Corp. v. Hood*, 541 U.S. at 448 ("A bankruptcy court's *in rem* jurisdiction permits it to 'determin[e] all claims that anyone, whether named in the action or not, has to the property or thing in question.' "). It follows, therefore, that the state probate court could not adjudicate this cause of action unless the court of bankruptcy abstained.

Further, Respondent initiated an adversary proceeding in the court of bankruptcy challenging Debtor's right to a discharge of his claim against her arising out of their family dispute. The matter of the Debtor's discharge and Respondent's bankruptcy proceedings were within the

§ 1334(e) *in rem* jurisdiction of the court of bankruptcy. That court's § 1334(e) exclusive jurisdiction was thereby triggered by Respondent, and absent abstention, jurisdiction was properly exercised by the court of bankruptcy.

Moreover, the courts of bankruptcy, by virtue of their *in rem* jurisdiction, have primary jurisdiction over all of the debtor's assets. This jurisdiction is paramount to any jurisdiction that may otherwise be conferred over the same subject matter on any other court, even including non-bankruptcy courts that have concurrent jurisdiction with the court of bankruptcy. Such paramount jurisdiction of the courts of bankruptcy has a long history. In the *New Haven Inclusion Cases*, 399 U.S. 392 (1970), the Court held that the reorganization court, rather than a special three-judge district court, had primary jurisdiction over the issue of the adequacy of the compensation to be paid for the debtor's assets. In that case, two groups of creditors sought relief in different courts. The two courts reached different decisions on "identical issues" as to the proper compensation. *Id.* at 428. The Court, on review of the orders of both courts, addressed the conflict of jurisdiction, and ruled that Congress intended the court of bankruptcy to have "primary jurisdiction" in light of the purposes of the bankruptcy law. *Id.* at 426-27. It held that jurisdiction rested exclusively in the court of bankruptcy. *Id.* at 426, 428-29.

Moreover, the Ninth Circuit itself, in *In re Crown Vantage, Inc.*, 421 F.3d 963, 971 (9th Cir. 2005), recently acknowledged that the courts of bankruptcy have paramount jurisdiction, stating: "The requirement of uniform application of bankruptcy law dictates that all legal proceedings that affect the administration of the bankruptcy estate be brought either in bankruptcy court or with leave of the bankruptcy court." *See also Kalb v.*

Feuerstein, 308 U.S. 433, 439 (1940) (federal bankruptcy jurisdiction is superior to that of a state court having concurrent jurisdiction); *Matter of United States Brass Corp.*, 110 F.3d 1261, 1268 (7th Cir. 1997) ("Section 1334(d) [reenacted as subsection (e)] gives the bankruptcy court control of all the property. Creditors who want to enforce their liens have to do so in that court regardless of the location of the creditor or the property."); *In re White*, 851 F.2d 170, 172-73 (6th Cir. 1988) ("The jurisdiction granted in 28 U.S.C. § 1334(d) [now subsection (e)] indicates a conscious effort by Congress to grant the bankruptcy court special jurisdiction and to preclude the type of jurisdictional disputes evidenced in [*Princess Lida of Thurn and Taxis v. Thompson*, 305 U.S. 456, 466 (1939)]."); *In re Modern Boats, Inc.*, 775 F.2d 619, 620 (5th Cir. 1985) (holding that the "admiralty court's previous acquisition of *in rem* jurisdiction . . . did not defeat the bankruptcy court's jurisdiction" because the "petition for reorganization withdrew jurisdiction from the admiralty court and lodged it exclusively in the district court" where the title 11 proceeding was pending) (internal citations omitted).

Following this line of authority, it is clear that the courts of bankruptcy, by virtue of their primary jurisdiction and *in rem* jurisdiction under § 1334(e), had paramount jurisdiction over the Debtor's tort cause of action, which could not be defeated except by virtue of an abstention order pursuant to § 1334(c). *Amici* urge the Court to rule that the probate exception does not repeal any portion of the jurisdiction conferred on courts of bankruptcy under 28 U.S.C. § 1334.

V. The History of the Probate Exception Explains Why It Does Not Apply to Bankruptcy.

Like all district court jurisdiction, bankruptcy jurisdiction is purely statutory. The origin of the probate exception provides an understanding of why it does not prevent a court of bankruptcy from exercising its statutory jurisdiction so as to grant a judgment on a bankruptcy debtor's tort cause of action that is enforceable only against the defendant who committed the tort, and not against the assets of a decedent's estate. As explained in *Markham v. Allen*, 326 U.S. at 494-95, early decisions established that the federal courts would not exercise their jurisdiction to probate or set aside probate of a will, or to administer a decedent's estate, although they could grant a "judgment [that] does not undertake to interfere with the state court's possession" of assets of the decedent's estate. *Id.* at 494.

The probate exception was derived from the interpretation by the courts of the scope of the first diversity jurisdiction statute, which was enacted as part of the Judiciary Act of 1789. *Id.* at 494. The theory for excepting probate matters from the diversity jurisdiction so granted in 1789 was that the "equity jurisdiction conferred by the Judiciary Act of 1789, . . . which is that of the English Court of Chancery in 1789, did not extend to probate matters." *Id.* at 494. As more recently explained by the Court in *Ankenbrandt v. Richards*, 504 U.S. 689, 698-99 (1992), in analyzing the origin of the domestic relations exception as a limitation on the exercise of diversity jurisdiction, the grant of diversity jurisdiction by the Judiciary Act of 1789 was likewise not construed to confer jurisdiction of divorce actions because in 1789 the equity jurisdiction of the federal courts did not extend to divorce actions, just as federal equity jurisdiction did not then extend to probate matters.

These exceptions thus were related to the inherently limited jurisdiction of the federal courts in 1789, and had nothing to do with bankruptcy jurisdiction. Bankruptcy relief was not available under the equity jurisdiction of the federal courts in 1789 and was first provided for in American law by the Bankruptcy Act of 1800 enacted pursuant to Art. I., § 8, cl. 4 of the Constitution. *See* CHARLES WARREN, BANKRUPTCY IN UNITED STATES HISTORY 1, 19 (Harvard Univ. Press 1935). Ever since the enactment of the first English bankruptcy statute in 1542, bankruptcy has always been a creature of statute. *See Sturges v. Crowninshield*, 17 U.S. 122, 142 (1819). Bankruptcy statutes never set forth a probate exception. Because bankruptcy jurisdiction did not stem from the equity jurisdiction of the federal courts in 1789 or from the statutes conferring diversity jurisdiction, and because bankruptcy statutes did not provide a probate exception, the probate exception was never applicable to bankruptcy and should not be read into bankruptcy jurisdiction, particularly as a bar to the granting of a bankruptcy judgment not directed against probate and not enforceable against assets of a decedent's estate.

VI. APPLICATION OF THE PROBATE EXCEPTION TO OUST THE COURT OF BANKRUPTCY OF JURISDICTION WOULD DEPRIVE THE ESTATE OF SUBSTANTIAL VALUE IN CONTRAVENTION OF THE GOAL OF BANKRUPTCY LAW TO MAXIMIZE THE VALUE OF THE DEBTOR'S ESTATE FOR THE BENEFIT OF CREDITORS.

Because 28 U.S.C § 1334 establishes the jurisdiction of the courts of bankruptcy to hear a debtor's suits, *Amici* contend that it must be read and interpreted in light of the fundamental goal of bankruptcy to maximize the debtor estate for the benefit of the creditors.

A. Bankruptcy Provisions Should Be Interpreted in Light of Their Congressional Purpose.

A statute should be interpreted in light of the congressional purpose for its enactment: "[C]ourts will construe the details of an act in conformity with its dominating general purpose [and] will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy." *SEC v. C. M. Joiner Leasing Corp.*, 320 U.S. 344, 350-51 (1943).

Interpretation of bankruptcy jurisdictional statutes is no different. The Court recognizes "the congressional purpose of deriving as much value as possible from the debtor's estate." *Toibb v. Radloff*, 501 U.S. 157, 164-65 (1991) (citing *Commodity Futures Trading Commission v. Weintraub*, 471 U.S. 343, 351-54 (1985)). Moreover, the Ninth Circuit itself acknowledged in *In re Gruntz*, 202 F.3d 1074, 1080 (9th Cir. 2000), that § 1334 "expands the historic role of the federal district courts in bankruptcy . . . so that they may deal efficiently and expeditiously with all matters connected with the bankruptcy estate," but overlooked that basic concept in its decision below. Holding, as the Circuit Court did, that bankruptcy jurisdiction is limited by the probate exception would run counter to the purposes of bankruptcy.

B. Bankruptcy Code Provisions Were Designed to Maximize the Estate For the Benefit of Creditors

The Bankruptcy Code was designed to maximize the debtor's estate for the benefit of creditors: First, upon the filing of a petition in bankruptcy, an all-encompassing bankruptcy estate is created. *See* 11 U.S.C.

§ 541. Second, the broad provisions of § 541 bring property and interests of the debtor into the bankruptcy estate. *Id.* Indeed, Congress intended to bring all of debtor's property interests including "causes of action" into the debtor's estate, H.R. REP. NO. 95-595, at 175 and 367 (1977), and made clear its intention to "bring anything of value that the debtors may have into the estate." *Id.* at 176. Likewise, as stated by the Court in *Weintraub*: "The trustee . . . has the duty to maximize the value of the estate." 471 U.S. at 352; *see also Bank of America National Trust & Savings Association v. 203 North LaSalle Street Partnership*, 526 U.S. 434, 444 (1999); *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 203, 204 n.8, 205 (1983).

The provisions of chapter 11 were structured on the basis of the notion that a prime purpose of reorganization is to maximize value that would be lost in liquidation. *See NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984) ("The fundamental purpose of reorganization is to prevent . . . misuse of economic resources."). In addition to the jurisdictional provisions designed to maximize the debtor estate, several other provisions exist to infuse value into the debtor estate: 11 U.S.C. § 542 mandates that all third parties, other than "custodians," turn over property in their possession to the bankruptcy trustee. The debtor estate is also enhanced by avoidance actions under 11 U.S.C. § 547 ("preferences") and 11 U.S.C. § 548 ("fraudulent transfers and obligations"), and the recovery of estate property under 11 U.S.C. § 550.

Bankruptcy jurisdiction should not be construed to be limited by the probate exception. 28 U.S.C. § 1334 should be broadly construed in furtherance of the bankruptcy goal of maximizing the debtor estate.

VII. A PARTY WHO INVOKES BANKRUPTCY JURISDICTION IS PRECLUDED FROM CONTESTING THE JURISDICTION OF A COURT OF BANKRUPTCY OVER COUNTERCLAIMS INVOLVING GENERALLY THE SAME SUBJECT MATTER THAT IS BEFORE A PROBATE COURT.

Respondent filed a proof of claim, the amount of which he denominated as "unliquidated," and also commenced an adversary proceeding against the Debtor in the bankruptcy case. By invoking the jurisdiction of the court of bankruptcy to challenge the Debtor's right to receive her discharge in bankruptcy of his claims against her, Respondent submitted to the jurisdiction of that court. *See Langenkamp v. Culp*, 498 U.S. 42, 44-45 (1990) (holding that filing a proof of claim against the estate operates to subject the party to the bankruptcy court's power). In response to Respondent's bankruptcy complaint, the Debtor filed her counterclaim for tortious interference with her expectancy of an *inter vivos* gift from her late husband, which he promised to make during his lifetime. Respondent must have contemplated that the Debtor would respond to his pleadings by asserting her claim for tortious interference as a counterclaim, as mandated by Rule 7013 of the Federal Rules of Bankruptcy Procedure.[6]

Having invoked the jurisdiction of a court of bankruptcy by commencing an action in which the Debtor counterclaimed, Respondent has necessarily submitted to the court's jurisdiction over the counterclaim. In analogous circumstances, the Court held in *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 849

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[6] Rule 7013 of the Federal Rules of Bankruptcy Procedure provides in relevant part: "Rule 13 F. R. Civ. P. applies in adversary proceedings . . . ." FED. R. BANKR. P. 7013. In turn, Rule 13 recognizes compulsory and permissive counterclaims.

(1986), that a party who invoked jurisdiction of a federal agency to adjudicate his claim could not be heard to object to the agency's exerci . of jurisdiction to adjudicate the adverse party's counterclaim.

Moreover, in *Arecibo Community Health Care, Inc. v. Commonwealth of Puerto Rico*, 270 F.3d 17, 28 (1st Cir. 2001), the First Circuit Court of Appeals addressed another analogous situation. In that case, the Commonwealth of Puerto Rico, protected from federal suit by its sovereign immunity, filed a proof of claim in the debtor's bankruptcy case. The debtor responded with a counterclaim for an amount vastly more than the Commonwealth's claim. The court held that by invoking the bankruptcy jurisdiction, the Commonwealth could not contest the jurisdiction of the court to adjudicate the debtor's counterclaim. As stated by the court: "Where a state avails itself of the federal courts to protect a claim, we think it reasonable to consider that action to waive the state's immunity with respect to that claim *in toto* and, therefore, to construe that waiver to encompass compulsory counterclaims . . . ." *Id.* at 28 (italics in original).

Similarly, this Court should rule that because Respondent invoked the jurisdiction of the court of bankruptcy by the litigation he commenced in that court, he cannot now assert that such court was without jurisdiction to adjudicate the Debtor's counterclaim for tortious interference.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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No. 04-1544

IN THE
Supreme Court of the United States

VICKIE LYNN MARSHALL,
Petitioner,

v.

E. PIERCE MARSHALL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR AMICI CURIAE HEIRS, INC. IN SUPPORT OF PETITIONER

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IN THE
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VICKIE LYNN MARSHALL,
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E. PIERCE MARSHALL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR AMICI CURIAE HEIRS, INC. IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF AMICI CURIAE

The HEIRS® organization, a Pennsylvania non-profit, was founded in 1992 to support the interests of beneficiaries of trusts and estates by improving the administration of trusts and estates. HEIRS® generally believes that beneficiaries' interests would be better supported if given the option of a federal forum for equity cases, or for claims raised against estates in the interest of getting fair and equitable resolution of their complaints.

SUMMARY OF ARGUMENT

Trust beneficiaries often face serious problems in defending their interests involving trust management. With the consolidation of the banking industry, many small institutions have been acquired by multi-state bank holding companies. Instead of a local institution with trust officers familiar with a family and the circumstances

Pursuant to Rule 37.6, none of the parties authored or contributed to the preparation of this brief.

of beneficiaries, the beneficiary is confronted with a new trustee, often in a different state, and administration conducted through call centers in some remote jurisdiction. Instead of the familiar trust officer, one gets a call center operator with no background in the purposes or terms of the trust, and no ready access to information other than current financial information about investments. Litigating disputes at the place of administration in Long Beach, Las Vegas, South Dakota, Wyoming or other call-center administrative sites, can be a difficult problem for the beneficiary living in other parts of the United States.

Moreover, mobility of trust beneficiaries often leaves children or grandchildren of settlors living far from the situs of the trust, with no personal interface with trust personnel. This often makes it difficult to deal with administration problems, or to get the attention of trust administrators. The beneficiary living in another State than the situs of trust administration thus frequently finds herself with a hostile forum in the local probate court. On the other hand, the probate judge may know the trust personnel who appear for annual accountings, appear at trust company programs, and be on a first-name basis with the local trust officers. Indeed, trust companies often hire every qualified trust and estate practitioner in the situs, in an effort to conflict out attorneys who might otherwise represent a beneficiary in a dispute over trust administration. The beneficiary with a serious problem often cannot find qualified local counsel, because every experienced practitioner has represented the trust company in fiduciary and administrative matters, and has a vested interest in protecting this source of future business. Furthermore, the income or remainderman from another State has limited access to counsel with experience in the local probate court.

There is another aspect to the problem. Many local probate courts have little experience with trust administration problems. The average probate judge has enormous experience in ordinary probates of wills, will contests, conservatorships and guardianships. Such judges typically deal with conflicts of interest and improper conduct with individual fiduciaries. But most specialized probate courts have little experience with complex trust or investment or tax disputes. On the one hand, probate judges in major metropolitan areas, particularly those in States where inter vivos trusts are frequently used as estate planning devices, may have experience in such complex trust disputes. But the bulk of probate or orphans court or surrogate judges likely have little exposure to the intricacies of the Uniform Prudent Investor Act and modern portfolio theory, or with the subtle conflicts involved in the indiscriminant and wholesale conversion of common trust funds and individual portfolios into proprietary mutual funds by corporate trustees.

The structure of probate courts varies greatly. There are several States with elected lay probate judges, although these courts generally defer to general jurisdiction courts for disputed matters. Others States have dedicated probate courts, many have general jurisdiction courts where a judge may sit in probate jurisdiction generally or only by occasional assignment, and a few have both probate and equity courts.

The strictures of court staffing may leave many of these probate judges with little time to hear complex estates. Often the probate judge sits as a divorce or family court judge, and some sit as juvenile court judges as well. When a large case involving a trust appears, the case may be sent to a general law and motion department for motions, or in some courts the probate judge handles these

initial matters herself. But in a large number of jurisdictions, the probate judge cannot spend a week or more in trial. For example, in San Francisco, a disputed matter which takes more than two afternoons to try will be sent out to the presiding judge for trial before the first available Superior court judge. The judge likely will have no exposure to complex trust or investment issues, particularly in dealing with the complexities of modern portfolio theory.

Beneficiaries have frequently used diversity jurisdiction to obtain a neutral forum for resolution of trust disputes. Federal judges increasingly deal with complex trust disputes, dealing with ERISA cases, class actions involving corporate trustees, the duties of bankruptcy judges, investment duty cases where the parties have fiduciary duties, indenture trustee cases, Indian trust disputes, and disputes between beneficiaries and/or trustees from different States. The quality of federal judges and their clerks, and the ability to get a single-assignment judge, provide a better forum for resolution of trust disputes by trustees than is afforded in many State jurisdictions. Most importantly, the federal forum provides a neutral trier of fact for the out-of-state beneficiary when a dispute with a local individual or corporate trustee in the jurisdiction is involved. Article III, Section 2 was designed to protect citizens from just the type of bias and appearance of bias which beneficiaries face in seeking to protect their rights involving trusts. Many of these disputes, particularly surcharge cases, are *in personam*, and interfere with no existing *in rem* jurisdiction. To the contrary, most States now seek to avoid court supervision and mandatory review of accounts, allowing access to courts only in cases of disputes or potential disputes. The rise of the use of inter vivos trusts as estate planning vehicles and the surrender

of court supervision by local probate courts means that most disputes between trustees and beneficiaries will not interfere with any existing assertion of jurisdiction by some supervisory court.

THE ARGUMENT

This Court has discussed the proper approach to dealing with the probate exception to diversity jurisdiction in *Exxon Mobil Corporation v. Saudi Basic Industries Corp.*, 125 S. Ct. 1517(2005). As this Court held there, "When there is parallel state and federal litigation, *Rooker-Feldman* is not triggered simply by the entry of judgment in state court. This Court has repeatedly held that 'the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction.'"125 S. Ct. at 1526-27. In the few cases where there are parallel proceedings, the *Saudi Basic* holding can permit diversity jurisdiction and resolve the merits on preclusion law. In most cases, however, there is no pending State proceeding with *in rem* or other jurisdiction over the trust in question, and diversity jurisdiction should be permitted as a matter of right. The Ninth Circuit in *Marshall* improperly looked to the possibility of exclusive jurisdiction over a trust as a basis for denying diversity jurisdiction. This is an impermissible attack of Article III, section 2. This Court has consistently held that the States cannot, by their assertion of exclusive jurisdiction, preclude or limit federal diversity jurisdiction.

In *Golden v. Golden*, 382 F.3d 348 (3rd Cir. 2004) the court provided a detailed discussion of the probate exception and its inapplicability in trust cases. For a similar analysis, see *Sianis v. Jensen*, 294 F. 3d 994 (8th Cir. 2002). However, in *Marshall v. Marshall*, 392 F.3d

1118 (9th Cir.2004), the Court held that the probate exception applied to a counterclaim brought in a bankruptcy proceeding where the claim duplicated issues raised in a Texas probate proceeding and where such claim had been held to be a compulsory crossclaim under Texas law. Since this interfered with the in rem jurisdiction of the State Court which conducted the probate litigation, the claim in a bankruptcy proceeding was held to be barred by the probate exception.

In choosing a forum, the ability to utilize federal courts should not be overlooked where diversity jurisdiction is feasible in trust matters. *See, e.g., Jefferson Nat'l Bank v. Central Nat'l Bank in Chicago, supra* 700 F.2d 1143. "The standard for determining whether federal jurisdiction may be exercised is whether under state law the dispute would be cognizable only by the probate court. If so, the parties will be relegated to that court. But where the suit merely seeks to enforce a claim *inter partes* enforceable in a state court of general jurisdiction, federal jurisdiction will be assumed." *Lamberg v. Callahan*, 455 F.2d 1213, 1216 (2d Cir. 1972); *Sianis v.* Jensen, 294 F.3d 994, 298 (8th Cir. 2002) (same); Markham *v. Allen*, 326 U.S. 490, 494 (1946). However, where the matter is administration of a matter of purely local jurisdiction, such as probate of a will, federal jurisdiction will not be available. *Celentano v. Furer*, 602 F.Supp. 777, 779 (S.D.N.Y. 1985); *Weingarten v. Warren*, 753 F.Supp 491, 493 (S.D.N.Y. 1990).

The existence and extent of a "Probate Exception" to federal diversity jurisdiction is one of the most perplexing issues of litigation. In *Markham v. Allen*, 326 U.S. 490 (1946), the Supreme Court articulated a probate exception to federal diversity jurisdiction looking, as it were, to the language of the judiciary Act of 1789 which conferred

jurisdiction in "suits of a civil nature at common law or in equity." This analysis was based on the 'fact' that "matters of probate and administration were, in 1789, within the exclusive jurisdiction of the English ecclesiastical courts and outside the reach of the High Court of Chancery and the common law courts." *Rice v. Rice Foundation*, 610 F2d 471, 475 (7th Cir 1979). As Justice Frankfurter observed: "legal history still has its claims." *Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U.S. 575, 609 (1942)(Frankfurter, J., concurring).

As Judge Posner pointed out in *Dragan v. Miller*, 679 F.2d 712, 713 (7th Cir. 1982):

> One does not have to be an expert historian to spot the flaws in this reasoning. First, there was no ecclesiastical court in America, and it is not obvious why the language of the Judiciary Act of 1789 should be taken to refer exclusively to English rather than American courts. Someone should investigate the jurisdiction of American equity courts in the eighteenth century relative to that of any specialized probate courts that might have corresponded to the ecclesiastical court in England; no one has.

The Court concluded that "however shoddy the historical underpinnings of the probate exception, it is too well established a feature of our federal system to be lightly discarded...." *Ibid.*

In fact, probate matters were not exclusively litigated in the Ecclesiastical Courts of England, let alone in the General Courts of the American governors and their councils. The Ecclesiastical Courts did not deal with real property--the result of Henry VIII's effort to free real

real property from the ungodly grasp of the monasteries and bishops. These Courts did admit wills to probate, but their administration was limited to the disposition of personal property. Simes and Basye, "The organization of the Probate Court in America: I", 42 Mich. L. R. 965, 968 (1944). Since orders of these courts were normally enforced by excommunication unless Chancery intervened, pagans, Catholics, Jews and unAnglicans had little to worry about in this world from Ecclesiastical Courts if they ran off with the decedent's goods.

The probate of real property and disputes over any type of property by necessity were litigated in the Courts of Law and Chancery. Chesnin and Hazard, "Chancery Procedure and the Seventh Amendment: Jury Trial of Issues in Equity Cases Before 1791," 83 Yale L. J. 999 (1974) and Simes, *supra.* Hence the historical premise of the exception was illusory. As Judge Posner notes, "Rigid historicist interpretations of the Constitution have not been much in vogue for generations." *Dragan, supra,* 679 F.2d at 714. Posner, however, looks to other issues of policy to support such a limitation, including the judicial economy of having specialized probate judges, continuous jurisdiction over various aspects of an estate or trust, and questions of primary jurisdiction where a State court has begun adjudication of a dispute. Considerations of comity and abstention predominate in such analysis rather than rigid historicist interpretations. The cases on the probate exception show a variety of outcomes, with some courts reciting the flawed historical arguments, others looking to comity considerations, and yet others asserting an unfettered right to litigate trust disputes.

"State legislatures can not impose restraints on federal jurisdiction by creating probate courts and vesting them with jurisdiction over similar issues." *Waterman v. Canal-*

Louisiana Bank & Trust Company, 215 U.S. 33, 40, 30 S.Ct. 10, 11, 54 L. Ed. 80 (1909)." *Bryden v. Davis*, 522 F. Supp. 1168, 1171 (E.D. Mo. 1981). *Waterman* cited in its decision the case of *Hess v. Reynolds*, 113 U.S. 73. 79 (1885) holding that "the jurisdiction of the courts of the United States over controversies between citizens of different states cannot be impaired by the laws of states which prescribe modes of redress in their courts, or which regulate the distribution of their judicial powers." *Hess* held that Michigan could not grant exclusive powers to its courts over controversies which would eliminate the rights of a citizen to seek diversity jurisdiction. In *Gross v. Weingarten*, 217 F. 3d 308, 221 (4th Cir. 2000), the Court held that "The Supreme Court has repeatedly and unequivocally rejected the deputy receiver's contention that a state may oust the federal courts of jurisdiction by creating an exclusive forum for claims against an estate."(citing *Hess*). The equitable jurisdiction of federal courts to hear disputes involving trusts cannot be impaired by state legislation seeking to vest exclusive jurisdiction. Once exclusive jurisdiction has vested because of registration of a trust and the initiation of litigation, the State court may have *in rem* jurisdiction precluding a competing action. *Matter of Trust Created by Hill*, 728 F. Supp. 564 (D. Minn. 1990). However, a beneficiary or trustee should have the choice of federal jurisdiction if there is no action pending since the States have no authority to reduce Article III, Section 2 power of Congress to provide for diversity jurisdiction. Federal courts have long-standing expertise in fiduciary disputes, including the obligations of the United States as trustee for Indian tribes, *Cobell v. Norton*, ___F.Supp. 2d___, 2005 WL 2665629; the fiduciary duties of bankruptcy trustees, *In re Moon*, 258 B.R. 829 (N.D. Fla., 2001); and the general common law of trusts, including the fiduciary duties of ERISA trustees, *Harris Trust and Savings Bank*

v. Salomon Smith Barney, Inc, 530 U.S.238, 120 S. Ct. 2180 (2000), *Meyer v. Berkshire Life Insurance Company*, 250 F.Supp.2d 544 (D. Md. 2003), *aff'd*, 372 F.3d 261 (4th Cir. 2004), *In re Worldcom, Inc. ERISA Litigation*, 2005 WL 221263 (SDNY Feb. 1, 2005), and class actions involving trust departments. In recent years, federal courts have taken the lead in developing the law involving fiduciary investments: *Nickel v. Bank of America NTSA*, 991 F. Supp. 1175, *rev. on other grounds, Nickel v. Bank of America*, 290 F.3d 1134 (9th Cir. 2002), *Harley v. Minnesota Mining and Mfg. Co.*, 42 F.Supp.2d. 898 (D. Minn. 1999), mod. *Harley v. Minnesota Mining and Manufacturing Co.*, 284 F.3d 901 (8th Cir. 2002), *Williams v. J.P. Morgan & Co.*, 296 F. Supp. 2d 453, (SDNY 2003).

The Uniform Probate Code limits jurisdiction over inter vivos trusts to circumstances where the trust has been registered under §7-102-03. Where the trust is not registered, a proceeding by a trust beneficiary against a trustee "is subject to the personal jurisdiction of a court in which the trust could have been registered." (UPC §7-104). Uniform Trust Code §202 (c) provides that "This section does not preclude other methods of obtaining jurisdiction over a trustee, beneficiary, or other person receiving property from the trust." Hence if the action has been initiated in federal court under diversity, no question of exclusive State jurisdiction could arise, even if the State were deemed to have the power to preclude diversity jurisdiction.

"The probate exception to diversity jurisdiction does not apply to trusts." *Weingarten v. Warren*, 753 F. Supp. 491, 494 (S.D. N.Y. 1990), *Georges v. Glick*, 856 F.2d 971, 997 (7th Cir. 1988) Questions of comity may, however, restrict assertion of such jurisdiction where a

State court has assumed jurisdiction, *Ibid.* and *Norton v. Bridges*, 712 F.2d 1156 (7th Cir. 1983) (removal held improper where state court had exercised jurisdiction over the trust), *Bassler v. Arrowood*, 500 F.2d 138 (8th Cir. 1974), *Matter of Trust Created by Hill*, 728 F. Supp. 564 (D. Minn. 1990).

"Because the probate exception is a judicially-created limitation on our jurisdiction, not one mandated by Congress, we construe it narrowly." *Georges*, 856 F.2d at 973. Many, if not most, courts have held that the probate exception does not apply to actions involving trusts. See Peter Nicholas, *Fighting the Probate Mafia: A Dissection of the Probate Exception to Federal Court* Jurisdiction, 74 S. Cal. L. Rev. 1479, 1493-94 & n. 70 (2001) (gathering and discussing cases)." *Sianis v. Jensen*, 294 F.3d 994, 999 (8th Cir. 2002). *See also* J. Winkler, "The Probate Jurisdiction of the Federal Courts," 14 Probate Law Journal 77.

Federal courts sitting in diversity have handled matters involving accounting actions against trustees, *Hamilton v. Nielsen*, 678 F2d 709 (7th Cir. 1982); and *Jefferson Nat'l Bank v. Central Nat'l Bank in Chicago*, 700 F.2d 1143 (7th Cir 1983); actions to remove trustees, *Denis v. R.I. Hosp. Trust Nat. Bank*, 744 F.2d 893 (1st Cir. 1984); collusion with a trustee, *Weingarten, supra*; interference with trust inheritance, *Georges, supra*, and *Glickstein v. Sun Bank/Miami, N.A., 922 F.2d 666 (8th Cir. 1991);* conversion claims, *Bryden, supra, Tarlton v. Townsend*, 337 F. Supp. 888 (N.D. Miss.), and *Hudson v. Abercrombie*, 682 F. Supp. 1218 (N.D. Ga 1987); and questions of interpretation of a trust, *National Audubon Society, Inc. v. Marshall*, 424 F. 2d. 717 (5th Cir. 1970). A claim of undue influence in obtaining an assignment of an interest in an estate was held to be "a garden variety

type in federal diversity jurisdiction, and it neither involves a 'controlling or obscure question of state law' nor requires special state expertise." *Giardina v. Fontana*, 733 F.2d 1047, 1051 (2nd Cir. 1984).

CONCLUSION

A recent case which HEIRS® believes would have been concluded cost-effectively in Federal court was the sizable and complicated Estate of Edmund J. McCormick sited in Westchester County, New York. Consisting in part of income producing real property located in four (4) states and administered by a corporate executor along with four individual co-executors (one of whom was seriously conflicted), a bank spokesperson admitted that its administration failed because quote – "It's so freakin' complicated." Curiously, during sixteen years of unsuccessful litigation and still unsettled, one Surrogate Judge was discovered to be a former bank VP and subsequently recused himself under pressure. The plaintiff, a principal beneficiary who was unaware and unadvised of the risks involved in her dual role as a co-executor not only lost a major portion of her inheritance but faces substantial legal charges incurred by the bank in defending its stewardship. In this case at least, HEIRS® believes that she would have been better served under Federal rather than local jurisdiction.

In general, the States should not be permitted to preclude a beneficiary or trustee from seeking a remedy in federal court where the parties are from different States, simply by offering a State proceeding for trusts registered there. The constitution was designed to protect citizens from bias in the courts of other states. Much has changed in the US since 1787, but the need for an unbiased court to review disputes between persons or entities in different

states remains constant. Time and modernity have not repealed basic human nature, and beneficiaries or trustees should have recourse to federal courts to protect their interests as the Constitution recognized.

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FOR ARGUMENT

(6)

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In The

Supreme Court of the United States

VICKIE LYNN MARSHALL,

Petitioner,

v.

E. PIERCE MARSHALL,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE NATIONAL COLLEGE OF PROBATE JUDGES IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICUS*

This *Amicus* Brief is submitted by the National College of Probate Judges in support of the Respondent. It is the position of the College that the decision of the Ninth Circuit Court of Appeals should be affirmed. Pursuant to Rule 37.3(a), all parties have consented to the filing of this brief.[1]

The National College of Probate Judges (hereafter "NCPJ" or the "College") was founded in 1968. Its major purposes are: to promote efficient, fair and just judicial administration in the probate courts and to provide opportunities for continuing judicial education to probate judges and related personnel. Its membership presently consists of about 575 Probate Judges from 28 states. The College is open to all Probate Judges and retired Judges. Associate membership is open to court personnel and to lawyers interested in probate law and reform.

The College generally has two national meetings per year to provide educational programs. The educational programs include oral presentations and written materials to the Judges attending. The College is also active in the area of publications relating to probate law. The College produces a quarterly publication focusing on recent developments and matters of current interest to the Judges. In addition, the College has had affiliations historically with the Boston University School of Law in support of the

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party to this dispute authored this brief in whole or in part and no person or entity, other than *amicus curiae*, made a monetary contribution to the preparation or submission of this brief. To the extent not previously filed, copies of the relevant letters of the parties consenting to the filing of this brief are lodged herewith.

Probate Law Journal, and more recently with the Quinnipiac Law School in support of the Quinnipiac Probate Law Journal. Members of the College have both attended and taught probate specialty courses at the National Judicial College in Reno, Nevada. Administrative support for the College is provided by the National Center for State Courts in Williamsburg, Virginia.

Members of the College have participated actively in guardianship reform and in the development of new uniform state laws in the probate area. In 1991 the College, collaboratively with the National Center for State Courts, established a Commission on National Probate Court Standards. This Commission produced a set of Standards (with Commentary) in the areas of general administration of probate courts, administration of decedents' estates, and protective proceedings (guardianships and conservatorships).

One of the activities of the College is the annual presentation of the William Treat Award for distinction in the probate area. The recipient is either a Judge, a practicing lawyer, or an academician. In 1983 the recipient of the Treat Award was The Honorable Sandra Day O'Connor of this Court.

The College wishes to disclose that one of its members, the Honorable Mike Wood, one of the Probate Judges in Harris County, Texas, was the Trial Judge in the Marshall Estate state court proceedings. Judge Wood was not involved in the decision of the College to file this *amicus* brief nor was he involved in the preparation of the brief or in determining the position taken by the College.

STATEMENT

The basic facts of the case and the history of the state and federal court proceedings below are as follows. The factors that seem most relevant to the College on the jurisdiction issues include the following:

1. Vicki Lynn Marshall aka Anna Nicole Smith invoked the jurisdiction of the Harris County Texas Probate Court both prior to and after the death of J. Howard Marshall, II challenging his estate plan and suing his son, E. Pierce Marshall, for tortious interference with expectancy of gifts both inter vivos and post mortem. She continued to participate in the probate proceedings following J. Howard Marshall, II's death.

2. The Harris County Texas Probate Court is a court of broad general jurisdiction over probate and probate-related matters.

3. While the state court probate action was proceeding Vicki Lynn Marshall filed for bankruptcy in the Federal Bankruptcy Court and asserted the same tort claim against E. Pierce Marshall that she was already pursuing in the Texas Probate Court.

4. The Bankruptcy Court at one point enjoined further proceedings in the Texas Probate Court (although this action was reversed by the U.S. District Court). Following a jury trial, the Texas Probate Court validated the decedent's estate planning instruments and dismissed the tortious interference claim.

5. Despite the pendency of the Texas Probate Court proceeding, the Federal District Court ruled on the governing instrument's validity

and the tortious interference claim, all in a manner contrary to the ultimate state court rulings.

6. It was the District Court ruling that the 9th Circuit vacated under the "probate exception" to federal jurisdiction.

SUMMARY OF ARGUMENT

The College will devote a substantial portion of its Brief to providing a summary of contemporary probate law and practice in the state courts with respect to the general succession (probate and non-probate) of a decedent's assets. This will illustrate the fact that distinctions between traditional "pure" probate of wills and administration of probate estates and other means of succession, including revocable trusts, are not meaningful in many respects; that at a minimum the probate exception should be applied to cases, such as this one, that involve determinations as to creation, validity, funding and administration of trusts which are will substitutes; and further that the statement of the probate exception in *Markham v. Allen*, 326 U.S. 490 (1946), should be clarified in its modern context.

The College will comment on broader approaches suggested by some of the current Court decisions, including an analysis of both tortious interference cases and trust cases as appropriately subject to the probate exception.

Finally, it is the position of the College, consistent with the 9th Circuit's view, that the probate exception should be applied in bankruptcy cases as well as diversity

and federal issue cases, at least in cases where the issues common to probate and bankruptcy have been, are, or may be litigated in state probate court proceedings.

Finally, the College suggests the adoption of a pragmatic approach focusing on the question of what issues, as a matter of policy, experience and efficiency, should be left to state probate court jurisdiction.

ARGUMENT

A. PROBATE COURTS, LIKE THE HARRIS COUNTY PROBATE COURT, HAVE BROAD JURISDICTION AS TO PROBATE-RELATED MATTERS.

Although the jurisdiction of probate courts around the country is not identical, there is a common pattern. Probate courts in the United States historically were created by the several states. They carried forward in this country the probate and equity jurisdiction of ecclesiastical and chancery courts in England. As noted by Judge Posner in *Dragan v. Miller,* 679 F.2d 712 (7th Cir. 1982), the historical record is not clear. Nevertheless, the original and traditional jurisdiction of probate courts certainly included the admission of wills to probate (thus, inherently, the determination of testamentary intent) and the appointment of a fiduciary.

There is some variation in the source of jurisdiction of state probate courts. Some derive jurisdiction from the state constitution; others from state statutes; still others from a combination of the two. Some have family law as well as probate jurisdiction. All have guardianship and conservatorship jurisdiction over the assets and affairs of

minors and incapacitated persons; some exercise jurisdiction over civil commitments of the mentally ill.

There are variations in the names of courts exercising probate jurisdiction. Most are called probate courts; in New York probate jurisdiction is in a Surrogate Court. In some states a separate probate court is granted exclusive probate jurisdiction within its geographical confines. Examples would be the Denver Probate Court, the statutory probate courts in Texas, and the various surrogate courts. In most states the probate court is a division of the highest general jurisdiction trial court and has full probate jurisdiction. In Colorado, for example, designated divisions of the District Courts outside of Denver exercise probate jurisdiction to the same extent as the Denver Probate Court. In some states original jurisdiction may be in a local court of inferior jurisdiction. Often these courts handle the routine, non-contested aspects of probate, usually with appeal or trial de novo to the highest court of general probate jurisdiction.

As used in this Brief a probate court will be considered to be a trial court of general jurisdiction in which probate matters are vested by the state constitution or state statute.

B. IN THE CONTEXT OF "INTERFERING WITH PROBATE," STATE PROBATE STATUTES HAVE A SERIES OF DISTINCT BUT RELATED FUNCTIONS WHICH APPLY TO NON-PROBATE TRANSACTIONS AS WELL AS TO "PURE" PROBATE.

Historically, probate in its narrow sense meant a proceeding to determine the validity of an instrument

purporting to be a will. This was "probating a will." In a broader sense probate was descriptive of the entire process by which a will was determined to be valid and a fiduciary was appointed to administer and distribute the decedent's estate. This was "probating an estate."

In attempting to articulate and apply the probate exception to federal jurisdiction, federal court decisions often focus on whether the federal jurisdiction and action will interfere with the probate process. *See, e.g., Georges v. Glick*, 856 F.2d 971, 974 (7th Cir. 1988).

We know from personal experience and anecdotal evidence that, in today's financial world, a relatively small portion of decedents' assets pass through the traditional probate process. Substantial assets pass at death outside the will in joint tenancy and tenancy by the entirety; and under life insurance and annuity beneficiary designations. It is likely that more wealth passes by retirement plan beneficiary designation than under wills; and there is increasing use of trusts as probate avoidance devices and as transfer tax minimization devices. *See* generally, John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 Harv. L. Rev. 1108, 1125-40 (1984).

It would be simplistic to characterize these kinds of transfers as non-probate transfers outside of the probate exception to federal court jurisdiction. They are a part of a wealth-transfer process which involves the jurisdiction of local probate courts in a variety of areas, common to both probate and non-probate transfers, such as adjudications regarding:

a) creditor rights;

b) family protection (exempt property and family support allowances);

c) transfer tax apportionment and collection;

d) spousal protection – statutory elective share;

e) revocation, as a matter of law, under probate statutes of non-probate transfers (mortmain statutes, revocation by dissolution of marriage, statutes disqualifying the succession by a felonious heir, and the like);

f) creation of protective arrangements for minor and incapacitated beneficiaries of both probate and non-probate transfers); and,

g) in a variety of contexts, determination of the testamentary intent of a decedent.

1. DISTINCT FUNCTIONS OF THE PROBATE PROCESS.

Discrete functions of probate administration process include:

(a) *Determination of the validity of the will or other donative instrument or transfer.* Sometimes a will is admitted to probate simply to perfect the marketability of title to real estate or to evidence the exercise of a power of appointment without the appointment of a personal representative. This function is, however, usually the first step in the process of administration.

(b) *Appointment of a personal representative.* The second common function of the probate process is the

appointment of a fiduciary to be responsible for the administration of the estate. The fiduciary (generically, "personal representative") has direct control over the probate assets (*i.e.*, those titled in the sole name of the decedent which pass under his or her will). The personal representative will, however, by statute or by the nature of his or her fiduciary duties, have additional responsibilities over a wide range of non-probate assets including, in appropriate cases, pre-death gifts and other transfers.

(c) *Marshaling of assets.* A traditional function of the probate process is the "administration" of the estate, that is the marshaling of assets, payment of expenses, and satisfaction of third-party interests, including taxing authorities and family support. This is normally the responsibility of the personal representative. The representative has fiduciary duties to the beneficiaries, and to some extent, to third party interests. While it is often claimed that certain non-probate transfers "avoid probate" that notion is simplistic and not accurate in all cases. For example, the personal representative generally has responsibility to see (1) that the decedent's creditors are paid; (2) that the decedent's federal and state estate taxes are paid; (3) that state statutory exempt-property and support allowances are provided for the benefit of the decedent's family; and (4) the statutory elective share rights of the surviving spouse are facilitated. To a greater or lesser degree state probate codes and the federal transfer tax statute give the personal representative rights against non-probate transferees to satisfy these third – party interests.

(d) *Distribution of net assets.* As the administration of the estate nears its end, the probate process has mechanics to facilitate the distribution of the net remaining

assets. As to probate assets the action of the personal representative (and hence the jurisdiction of the probate court) is clear.

As to non-probate interests, the jurisdiction of the probate court is often invoked by petition to clarify any questions as to who is entitled to distribution (e.g., adjudicating the sequence of deaths under the Uniform Simultaneous Death Act or otherwise to determine succession to joint tenancy interests; and interpretation of class gift language under trust and life insurance policies, including the issues of later-born class members, natural children, and adoptees).

In this area of "non-probate" interests, an issue commonly adjudicated by the probate courts is the determination of the nature of joint tenancy bank accounts. For example, did the decedent add the name of a friend or family member to his or her bank account with the intent to make a gift effective at death, or was the intent to create a "convenience" account – that is, to add a name for the limited purpose of payment of the decedent's bills?

In connection with the distribution function of estate administration, a problem commonly encountered is that the donee is an incapacitated person. Sometimes in wills and trusts there is facility-of-payment language authorizing the fiduciary to make a distribution to a third party for the benefit of the beneficiary. Often there is not. Where there is no language the probate court has jurisdiction to effectuate the transfer by creation of a conservatorship or, in the case of smaller amounts, by authorizing of a transfer to a third party as custodian under the Uniform Transfers to Minors Act or the Uniform Custodial Trust Act. These incapacity issues also arise commonly in connection

with non-probate transactions, and the probate court will have jurisdiction to authorize a protective arrangement.

(e) *Closing of estate and protection of the personal representative and distributes.* The final function of the probate process is to effect a "closing" of the estate. There are statutes of limitation designated to provide finality in the administration and distribution of assets, and in particular to protect both the personal representative and distributees from third party claims (or the claims of other beneficiaries).

We have chosen to illustrate the operation of the probate process and its impact on both probate and non-probate assets by reference to several uniform state laws. Primary is the Uniform Probate Code, substantially enacted in about 18 states, with portions of its administrative and substantive law provisions enacted in a majority of the remaining states.

2. STATE PROBATE STATUTES SUCH AS THE UNIFORM PROBATE CODE COVER NON-PROBATE TRANSFERS (INCLUDING TRUSTS) AS WELL AS PROBATE ASSETS.

The effect of the Uniform Probate Code (UPC) on non-probate interests is reflected in the following provisions.

Article I, § 1-102(b)(2) provides that one of the purposes of the UPC is "to discover and make effective the intent of a decedent in distribution of his property."

Article II deals with intestacy rules and donative transfers. Parts 2, 3, and 4 deal with protection of the surviving spouse and children and reflect a mix of both probate and non-probate assets. Section 2-201 et seq.

dealing with the elective share of the surviving spouse will be discussed at some length below.

Sections 2-301 and 302 deal with the pretermitted (or omitted) spouse and children. The concept is that an intestate share should be provided unless there is evidence that the decedent provided for the family members by transfers *outside of the will* that is by looking to the nature and extent of non-probate transfers.

Section 2-405 deals with funding of exempt property and family support allowances. The personal representative has discretion to establish a family allowance up to a set monetary cap. An interested party may petition the Court for an allowance other than what the personal representative determined or may have determined; this commonly takes into account the amount and receipt of non-probate transfers to the family members.

Article II, Part 6 of the Code provides for rules of construction applicable only to wills; and Part 7 provides rules of construction applicable to wills and other governing instruments (such as revocable trusts, annuities, life insurance, retirement benefit designations).

Rules common to wills and other governing instruments include:

> Section 2-702 – 120 hours survival requirement (applicable to wills, revocable trusts and joint tenancy transfers); § 2-703 – recognition of choice of law; § 2-704 – requirements for exercise of powers of appointment; § 2-705 – construction of class gifts; § 2-706 – alternate taker where non-probate beneficiary fails to survive; § 2-707 – trust future interests; alternate taker when beneficiary fails to survive (including class gifts);

> § 2-708 – construction of class gifts to "descendants," "issue," and the like; and § 2-709 – distribution under class gifts "by representation," "per capita," and "per stirpes."

Part 8 contains general provisions concerning both probate and non-probate transfers: § 2-803 deals with the effect of homicide by a successor on various transfers (the felonious-heir rule or "slayer statute"); § 2-804 deals with revocation by law of donative provisions for the spouse in the event of dissolution of marriage.

Article II, Part 11 deals with disclaimer of interests, including non-probate joint tenancies and powers of appointment. §§ 2-1105, 1106, 1107 and 2-1110.

Article III of the UPC deals with probate of wills and administration. Section 3-105 deals with subject-matter jurisdiction.

Under § 3-709 the personal representative has the right to and shall take possession or control of the decedent's personal property (with an exception regarding possession of certain tangible personal property and real estate which may be left in the possession of a devisee subject to the representative's retained powers) as follows:

> The personal representative shall pay taxes on, and take all steps reasonably necessary for the management, protection and preservation of, the estate in his possession. *He may maintain an action to recover possession of property or to determine the title thereto.*

(Emphasis added).

Article III, Part 8 deals with creditor claims. Section 3-803 provides the personal representative with the ability

to obtain the benefit of a short, four-month, limitation period by publication against known creditors. In addition, there is a short one-year self-executing bar against pre-death claims which is designed to carry out one of the core purposes of the Probate Code, that is to "promote a speedy and efficient system of liquidating of the estate of the decedent and making distribution to the successors." § 1-102(b)(3).

Purportedly free-standing, plaintiff-versus-defendant lawsuits for tortious interference with gift, contract or inheritance may be motivated by an attempt to circumvent a short non-claim period where the one-year period has passed and the plaintiff has failed to challenge the will or to perfect a creditor's claim.

Article III, Part 9A provides for apportionment of estate taxes. Absent governing instrument language to the contrary, estate taxes are apportioned pro rata against the value of the assets which generate the tax, with the transferee, such as a spouse or a charity, given the benefit of any available deductions. The tax-apportionment statute applies to probate assets, non-probate transfers, and to certain pre-death completed gifts. Under the Internal Revenue Code the primary responsibility for collecting and paying the taxes is placed on the personal representative, and § 3-9A-109 gives the personal representative the right of contribution or reimbursement from non-probate transferees.

Article VI of the Code deals with non-probate transfers on death. Section 6-101 validates non-probate transfers even though they may not have been executed with the formalities (witnessing and acknowledgment) of the

statute of wills. This includes non-probate transfers on death of interests:

> . . . in an insurance policy, contract of employment, bond, mortgage, promissory note, certificated or uncertificated security, account agreement, custodial agreement, deposit agreement, compensation plan, pension plan, individual retirement plan, employee benefit plan, trust, conveyance, deed of gift, marital property agreement, or other written instrument of a similar nature . . .

§ 6-101.

Section 6-102 deals with the liability of certain non-probate transferees with respect to both creditor claims and statutory allowances.

Article VII of the Code deals with trust administration. In § 7-201 it is provided that the Probate Court has exclusive jurisdiction of proceedings brought by interested parties concerning the internal affairs of trusts. Proceedings which may be maintained in this section are those including the administration and distribution of trusts, the declaration of rights, and the determination of other matters involving trustees and beneficiaries or trusts. Section 7-204, however, provides concurrent jurisdiction of litigation, not involving the internal affairs of trusts, but rather involving trusts and third parties, including actions by or against creditors or debtors of trusts and other actions and proceedings involving trustees and third parties.

This pattern of jurisdiction (exclusive jurisdiction in the Probate Court regarding internal affairs of trusts and concurrent jurisdiction regarding actions by or against third parties) is also provided in Uniform State Laws regarding trusts (Uniform Trust Code §§ 201, 202, 203).

The same distinction is reflected in the Federal cases which apply the probate exception to cases regarding all internal affairs of estates and trusts but not necessarily to third party actions where the estate or trust is a plaintiff or defendant. *See, e.g., Breaux v. Dilsaver*, 254 F.3d 533 (5th Cir. 2001).

3. SPECIAL AREAS OF PROBATE COURT EXPERIENCE.

In connection with the operation of the probate process there are a number of areas where state probate courts have developed special expertise in determining the essential nature of an action and the extent of authority of a fiduciary. These include the following:

(a) Whether a remedial action against a fiduciary is equitable in nature, even though couched as a "legal" negligence action affecting:

1) The applicable statute of limitations; and

2) An equitable surcharge remedy versus such legal remedies as punitive damages.

(b) Whether acts of a fiduciary are essentially done in his or her individual versus fiduciary capacity.

(c) Whether a special administrator should be authorized to expend estate funds to investigate and rescind questionable pre-death transactions of the decedent.

(d) Whether issues involving the validity of several wills should be combined in a single proceeding or in a series of separate proceedings.

(e) Whether questionable pre-death transfer actions should be combined with will contest actions where the issues (of capacity and undue influence) and the parties are substantially the same.

(f) Whether, under some state elective-share statutes, non-probate transfers are fraudulent as to the marital interest and should be disregarded.

(g) Whether a person has or lacks legal capacity for various purposes including testamentary capacity regarding wills and trusts, donative capacity regarding gifts, contractual capacity, and functional capacity in guardianships.

To illustrate the nature of state court probate jurisdiction and experience, the College provides two examples. In each it seems sensible and appropriate for the federal exemption to apply and for the issues to be resolved by the state probate court.

Illustration No. 1: Suppose the case of A, an elderly widower. His sole heir at law is his nephew B who lives in another state. A's support group consists of his neighbors who are members of his church. At A's request B moves into A's house. B maintains that there was an understanding (nothing in writing) that at A's death B would receive his estate (or at least his house). It appears to neighbor C that A and B are not getting along and that B may be abusing A. A executes a will naming C as personal representative and beneficiary, and gives C a power of attorney. B's name had been added to A's bank account. B is now replaced by C. A dies and B is unhappy about being excluded. B's attorney advises that he might have the following rights and remedies:

1. Contest A's will based on lack of capacity or C's undue influence. (Classic probate in rem situation).

2. File a claim against A's estate for breach of contract to make a will or devise.

3. File a claim against the estate for the house based on promissory estoppel.

4. File a claim against the estate for the value of services provided based upon quantum merit.

5. Commence a tortious interference action against C regarding B's inheritance rights as heir at law and regarding B's contractual rights.

6. Seek to impose a constructive trust against A's assets in C's hands.

Under each theory the parties are the same: B and C. The assets involved are the same; and the remedy under each would be to benefit B at C's expense. Formalistically, the tortious interference actions are free-standing plaintiff-versus-defendant actions; the balance are traditional probate actions.

This range of actions seems to the College to be essentially probate in nature (certainly in the basic sense of determining and carrying out testamentary intention, in accordance with one of the chief purposes of the UPC) and it does not seem appropriate for B to be able to opt for federal jurisdiction (assuming diversity and amount in controversy) by the characterization or labeling of his action in tort. In the College's view, such an option for B would constitute a privilege, in essence, to "forum shop."

Illustration No. 2: Another case which may be useful in characterizing what is a probate action is the determination of the statutory elective share of a surviving spouse. Historically the spouse's election was "against the will" and involved only "pure" probate assets. From a policy perspective it became apparent that providing a forced share of a decedent's estate for the surviving spouse was easily avoided, either intentionally or unintentionally, by having substantial assets pass to third parties outside of probate (say by diversion through the creation and funding of a revocable trust with provisions for beneficiaries other than the spouse.)

The modern statutory solution takes into account the realities of wealth transmission. Uniform Probate Code § 2-201 et seq., for example, defines a "net augmented estate" which consists of:

a. The net value of the "pure" probate estate; plus

b. Transfers to a surviving spouse by revocable transfers from the decedent (i.e., joint tenancy, revocable trust, life insurance, annuity beneficiary designation, exercise of power of general power of appointment and the like); plus

c. Similar non-probate transfers to parties other than the surviving spouse; plus

d. By viewing marriage as a kind of economic partnership and thus including the value of the surviving spouse's own separate assets as part of the computation.

When the value of the augmented estate is computed, the share of the spouse will be a percentage thereof (similar to a pension-vesting schedule) with a spouse entitled to 50% in a long-term marriage. The value of the spouse's percentage is then reduced by the combined value of the assets passing to the spouse under the decedent's will, plus the non-probate transfers to the spouse; plus the spouse's own assets. If there is a shortage, then the spouse is entitled to pro rata contribution from the other donees or transferees, both under the will and under non-probate transfers. To complicate the equation, some completed pre-death gifts are included both in the decedent's augmented estate and in the value of the spouse's separate estate (e.g., those gifts made in the years close to death in excess of the federal gift tax annual exclusion).

This process involves complex issues of characterization and valuation of both the decedent's and spouse's assets and may involve a series of hearings over a multi-year time frame. This would appear to be a probate matter exclusively suitable for state probate court resolution under the probate exemption.

A narrow reading and application of the probate exception might not, however, produce this result. The design of the Uniform Probate Code elective share proceedings creates what is, in effect, a plaintiff-versus-defendant action. The narrow probate administration process produces only one element of the overall elective share calculation, that is the determination of the decedent's net probate estate. Procedurally, the spouse brings an action against all third parties (probate and non-probate beneficiaries of the decedent) from which he or she seeks contribution. Technically the personal representative of the estate is not a party to the elective share

proceedings (except perhaps to facilitate contributions from probate beneficiaries under the will).

It seems to the College that a narrow reading of the probate exception (as argued by the Petitioner) would clearly produce the wrong result both in the elective share case and in the case of B against C and that state court jurisdiction is appropriate and preferable in each.

C. IN GENERAL THE PROBATE EXCEPTION SHOULD APPLY BOTH TO TRUSTS WHICH ARE WILL SUBSTITUTES AND TO TORTIOUS INTERFERENCE ACTIONS.

1. WILLS VS. TRUSTS.

At minimum the federal probate exception should cover cases involving the validity of trusts which are will substitutes and the administration of revocable trust estates. Such will substitutes may involve either revocable or irrevocable trusts.

The trend in the cases and statutory law reform during the past several decades has been to eliminate distinctions between probate administration and the administration of trusts which are will substitutes. Most of the focus has been on revocable trusts and is sometimes described as "leveling the playing field" between wills and trusts.

As stated in the Reporter's Notes to the Uniform Trust Code, "The basic policy of this Article [Article 6 – Revocable Trust] and of the Uniform Trust Code in general is to treat the revocable trust as the functional equivalent of a will." As such, the revocable trust also constitutes an

explicit expression of the settlor-decedent's testamentary intent.

Historically there was some authority, in Massachusetts in particular, for the proposition that a decedent's revocable trust assets were not subject to his or her creditor claims absent governing language to the contrary. This is no longer the case, and the modern rule is reflected in the Restatement (Third) Trusts, § 25 Comment e, (2003), and the Uniform Trust Code, § 505.

Historically, there was also a question as to whether the capacity to execute a trust (a two-party document looking in some respects like a contract) would be the same as to execute a will. The modern authorities provide that the test is the same for each. Uniform Trust Code § 601, Restatement (Third) Trusts § 11(1) (2003).

Historically, trusts, as two-party instruments, were subject to the contract rules for reformation to correct a mistake; but wills, being one-party instruments, were not reformable. Again, the modern authorities treat both documents as reformable. Restatement (Third) of Property: Donative Transfers § 12.1 (2003).

In the tax area, historically all trusts were on calendar years for income tax purposes, while an estate could make a beneficial election to select a non-calendar fiscal year (so as to obtain flexibility in the planning of distributions). Now revocable trusts may elect to be taxed as if they were part of a probate estate, thus obtaining the same benefit. I.R.C. § 645(a). The wide range of benefits is detailed in Steve R. Akers, *Worth the Effort Even Beyond the Grave – an Update of Post-Mortem Tax Planning Strategies* § 803.6, p. 8-47, 37 Heckerling Institute on Estate Planning 2003, Lexis Nexis Matthew Bender.

Regarding the surviving spouse's elective share, historically, as indicated above under state law the elective share of a surviving spouse against the will could be frustrated by placing substantial assets into a revocable trust (which assets were outside of the probate estate). The modern cases and statutes reverse this and provide that the decedent's revocable transfers (including revocable trusts) are subject to satisfaction of the surviving spouse's elective share. *See, e.g.*, Uniform Probate Code § 2-201 et seq.

2. TORTIOUS INTERFERENCE.

Lindberg v. U.S., 164 F.3d 1312 (10th Cir. 1999) states the classic elements of tortious interference with an expectancy of inheritance as provided by the Restatement (Second) of Torts, Section 774B, as follows:

a) A valid expectancy to inherit;

b) Intentional interference with that expectancy;

c) Independent tortious conduct (such as undue influence, fraud, or deceit);

d) Reasonable certainty that, absent the tortious interference, plaintiff would have received the expectancy; and

e) Damages.

The *Lindberg* case, citing prior 10th Circuit decisions, notes that the plaintiff must show more than a "mere expectancy" or a hypothetical or abstract expectancy. Instead, that plaintiff "must show a tangible basis to assert a prospective inheritance such as being an heir at law of the decedent" or a residuary devisee of a previous

will or other testamentary document. *Lindberg, supra*, 164 F.3d 1312, 1319.

The valid expectancy to inherit seems inherently a state court probate issue. If the plaintiff must establish a tangible basis for the expectancy, there must be a threshold determination of the plaintiff's standing, either as an heir at law under intestacy or a testacy right under a will. Further, this "valid expectancy" will depend upon the testamentary and donative intent of the decedent. Logically the decedent either had an intent as expressed in his will (or trust), or he had some other intent which was tortiously interfered with. An element common to contested will (or trust) cases and to tortious interference cases is the central issue of intent.

Under any of the several Circuit Court tests for the probate exception it appears that attempts to litigate tortious interference with inheritance cases in federal courts should be subject to the probate exception.

D. THE NATIONAL COLLEGE OF PROBATE JUDGES SUGGESTS THAT THE COURT ADOPT THE APPROACH OF *DRAGAN V. MILLER*.

In the view of the College, the above discussion of the typical state court probate jurisdiction, the experience of probate judges in the classification of actions, and the nature of modern estate administration, altogether, suggest the following conclusions:

1. A standard which limits the probate exception to the admission of wills to probate and the administration of probate estate assets is too narrow.

2. A more practical approach should be taken to conform the realities of modern probate to the purposes of the probate exception.

3. From the perspective of practicing probate judges, of the several approaches taken by the Circuit Courts, the ancillary-to-probate action test as articulated by the 7th Circuit in *Dragan v. Miller*, 679 F.2d 712, 715 (7th Cir. 1982), is preferable.

Dragan v. Miller, supra, was a case where, following the administration and distribution of an estate, a third party sought to impose a constructive trust on estate asset in the hands of the devisee (on a tort theory involving undue influence).

The Court in *Dragan* proposed a "practical approach" based the holding of this Court in *O'Callaghan v. O'Brien*, 199 U.S. 89 (1905), where this Court applied the probate exception not only to matters of pure probate in the strict sense of the word, but also to proceedings "ancillary to the original probate, ..." The Court determined that the constructive trust issue was "ancillary" to probate, in the practical sense that allowing it to be maintained in federal court would impair the policies served by the probate exception.

The policy goals underlying the probate exception as articulated in *Dragan* were summarized and applied by the 7th Circuit in *Storm v. Storm*, 328 F.3d 941 (7th Cir. 2003), to a case of alleged tortious interference with an inheritance expectancy. In *Storm*, the Court stated:

> In *Dragan* and subsequent cases, we identified several practical bases for the exception. One practical reason for excluding probate matters

from federal jurisdiction, albeit not the strongest one, is to encourage legal certainty – that is, to ensure that the outcomes of probate disputes will be consistent by limiting their litigation to one court system, rather than providing disputants the choice between two. *Dragan*, 679 F.2d at 714. A second goal is to promote judicial economy. *Id.* The process of determining and effectuating a decedent's testamentary wishes will generally begin in a state court. "If the probate proceeding thus must begin in state court, the interest in judicial economy argues for keeping it there until it is concluded." *Id.* "By restricting probate matters and will contests to state courts, questions as to a will's validity can be resolved concurrently with the task of estate administration." *Georges*, 856 F.2d at 974. This serves to preserve the resources of both the federal and state judicial systems and avoids the piecemeal or haphazard resolution of all matters surrounding the disposition of the decedent's wishes.

We have referred to "relative expertness" as another practical reason for the exception. *Dragan*, 679 F.2d at 715. Because state courts have nearly exclusive jurisdiction over probate matters, state judges vested with probate jurisdiction develop a greater familiarity with such legal issues. A final practical reason for having an exception is to avoid unnecessary interference with the state system of probate law. *Georges*, 856 F.2d at 974. This reason is actually a consequence of the other rationales: if state courts have the exclusive task of probating a will, and thus develop the relative expertise to do so (including the expertise to deal with all matters ancillary to probate), then federal court resolution of such

> matters is unlikely to be more than an unnecessary interference with the state system.

In *Storm*, the plaintiff, Brion M. Storm, argued that the probate exception should not apply for two reasons. First was that the case was a tort action rather than a will contest, and secondly that the case involved the provisions of a trust rather than a will. The Court dismissed both of these arguments, noting that mere labels, whether an action is styled as a tort action or a will contest, should not be decisive in the probate-exception analysis.

With respect to the "tort" label, the Court found:

> While Brion phrases his action as one involving tortious interference with his inheritance expectancy, the practical effect of his lawsuit would be similar to that of a successful will contest: the terms of the final, allegedly invalid testamentary instruments would essentially be bypassed, while Brion would receive, as damages, the assets he would have otherwise been entitled to under what he says are Evelyn's actual will and trust.

Storm, supra, 328 F.3d 941, 945.

E. UNDER THE FACTS OF THIS CASE THE PROBATE EXCEPTION SHOULD APPLY TO THE BANKRUPTCY ACTION.

The concept of federal exception is beneficial in terms of its basic policies and it should be applied broadly rather than narrowly.

The exception applies easily in federal question cases since the deference to a state court with general jurisdiction will produce a full adjudication of the probate-related issues (even where the state court is applying federal law).

In the bankruptcy context if there are full-jurisdiction state court proceedings which are completed, pending, or available then there should be deference to the state court proceedings so as to avoid interference with them.

In the Marshall Estate there were state probate proceedings pending, encompassing an essential determination of J. Howard Marshall, II's testamentary intent, and the actions of the Bankruptcy Court and the Federal District Court improperly interfered with the state court proceedings.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the 9th Circuit in this case.

Respectfully submitted,

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IN THE

Supreme Court of the United States

VICKIE LYNN MARSHALL,
Petitioner,

v.

E. PIERCE MARSHALL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE PHILANTHROPY ROUNDTABLE AS *AMICUS CURIAE* SUPPORTING THE RESPONDENT

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INTEREST OF AMICUS [1]

The Philanthropy Roundtable is a non-profit organization of 500 philanthropic foundations and individual donors. The Philanthropy Roundtable is committed to preserving donor intent and to helping philanthropists ensure that their intentions are followed. Members of The Philanthropy Roundtable are affected by legal rules that govern the ability of donors to direct (and of charitable foundations to receive) charitable gifts and bequests. Amicus has a substantial stake in promoting legal rules that enhance the security of charitable gifts and bequests, that reduce opportunities for litigation over such gifts in multiple fora, that reduce the costs associated with litigation over gifts and bequests, and that allow donors to know the law that will govern disposition of charitable gifts.

The question before this court—when federal courts will find jurisdiction over matters that are at the core of probate determinations—affects these interests. Expanding federal jurisdiction in the manner advocated by Petitioner would increase the probability of multiple suits respecting charitable bequests, of forum-shopping by parties seeking to contest such bequests, and of extended delays in finalizing bequests. It also would reduce the certainty of the law governing charitable bequests. Amicus and the philanthropic foundations and donors it represents support continuation of this Court's traditional respect for state probate determinations.

STATEMENT

Stripped to its essentials, this case is a simple will contest. The questions that were central to the resolution of the claims

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[1] The parties to this case have filed with the Clerk of this Court written letters giving blanket consent to the filing of amicus briefs. This brief was not authored in whole or in part by counsel for any party, and monetary support for the preparation and submission of this brief has been provided entirely by *amicus curiae*, its members, and its counsel.

presented in federal court were virtually identical to those presented in state probate court: Was there a valid will? Did the decedent have the requisite capacity to execute the estate planning documents? Was there fraud in the creation or alteration of these documents? Whose signature was on the documents? Was an enforceable promise made to the surviving spouse that should have been the basis for a transfer of property to her from the decedent's estate? Both the state and federal claims turn on the answers to these questions.

Resolution of the legal issue before this Court, thus, must be rooted in understanding that, after all is said and done (and, during more than a decade of litigation, a great deal has been said and done), this is at its core a straightforward contest over the will of J. Howard Marshall II (J. Howard). Petitioner, Vickie Lynn Marshall (better known by her stage name, Anna Nicole Smith), seeks to invalidate J. Howard's will which left his substantial estate to several relatives and to selected charities, but not to Vickie, his wife for the last fourteen months of his life. Pet. App. 3, 11, 30. Respondent, E. Pierce Marshall (Pierce), J. Howard's son and principal heir, seeks to uphold the will. Pet. App. 11. The issues in the case all revolve around this contest.

The case is complicated by three facts. First, J. Howard's will was not the sole — indeed, not the primary — estate planning document. A living trust was the principal vehicle for disposing of his assets following his death. Pet. App. 4.

Second, in addition to challenging the will and associated trust directly, Vickie has styled some of her complaints as tort actions for interference with an expected gift. Jt. App. 28; Pet. App. 12-13, 31-33. These claims are directed against Pierce, who is both the primary heir to J. Howard's estate and also the executor of the estate, and cannot be resolved without addressing the same questions Vickie raises in challenging the will and trust directly. Pet. App. 10-13.

Third, after Vickie filed actions in state probate court in Texas (as a resident of Harris County, Texas) to contest J. Howard's estate plan, Jt. App. 26; Pet. App. 11, 41, 150, she also filed a voluntary bankruptcy petition in California, claiming to be a resident of that state. Pet. App. 2, 12. Her asserted reasons for filing were the need to satisfy a default judgment obtained by her own personal assistant and her failure to inherit from J. Howard's estate. Pet. App. 41(n.3), 150-151(n.3), 202. The primary debt that Vickie claimed required the bankruptcy filing later was settled for an amount that made the proceeding unnecessary. Pet. App. 41(n.3), 150-151(n.3), 202(n.3).

Pierce did, however, ask the bankruptcy court to declare that bankruptcy would not discharge obligations that might arise from potential defamation claims against Vickie, and Vickie then asserted a panoply of claims against Pierce mirroring those made in the Texas probate litigation. Pet. App. 12, 42-43, 152. These included assertions that Pierce held J. Howard against his will, forged J. Howard's signature, altered testamentary documents, and generally interfered with Vickie's expectancy that J. Howard would execute a new provision for transferring monies to her to take effect on his death. Jt. App. 23-24; Pet. App. 5, 12-13. State and federal courts gave directly conflicting answers to the questions raised in both proceedings. Pet. App. 2.

The Texas probate court, after a five-month trial before a jury, concluded that J. Howard's will was valid, that the trust amendment was valid, that the signatures were valid and not forged, that J. Howard had intended to dispose of his assets in accord with the terms of the trust and will, and that he did not intend to give a gift or bequest to Vickie beyond the roughly $6 million transferred to her, through a signed document executed by J. Howard, as consideration for her marrying him. Jt. App. 54-62, 93, 125-26, 129-30; Pet. App. 5-6, 18-21. These conclusions were based on a unanimous jury

verdict, including specific findings of fact. Jt. App. 118; Pet. App. 19. Prior to the entry of judgment in the probate case, the bankruptcy court had reached opposite conclusions on virtually every point. Pet. App. 15-17, 43-44, 153-55. The bankruptcy court's conclusions were based largely on adverse inferences drawn from its determination that Pierce had not complied with discovery orders. Jt. App. 240-45; Pet. App. 14, 44, 46, 153. Pierce was not permitted to introduce contrary evidence on these points. Pet. App. 14-15, 44, 46, 153.

The district court for the Central District of California, taking up these matters after the Texas probate court decision, determined that the matters in controversy between Vickie and Pierce were not part of the core bankruptcy proceeding. Pet. App. 171-173, 186. The district judge vacated the bankruptcy court's judgment (Pet. App. 186) and treated the bankruptcy judge's decision as stating merely proposed findings of fact and conclusions of law, conducting the proceeding before the district court *de novo*. Pet. App. 130(n.42), 156. The judge made his own review of evidence also introduced in the far lengthier probate court trial, made his own findings respecting Pierce's actions and their effect on the validity of the testamentary documents at issue in the probate proceeding, and rendered his own conclusions respecting issues such as the validity of J. Howard's will and J. Howard's intentions respecting further gifts to Vickie. Pet. App. 6, 22-23, 46, 123-27, 128(n.41), 129, 136. Those findings and conclusions were directly at odds with the findings and conclusions that had been reached by the Texas probate court. Jt. App. 54-62, 93, 119, 124; Pet. App. 5-6, 22-23, 32-33.

Pierce moved for dismissal on the ground that the matters in controversy were within the jurisdiction of the Texas probate court and outside the scope of the district court's jurisdiction. Pet. App. 21. In the alternative, Pierce urged the

district court to find that the matters had been disposed of by the Texas court in a proceeding in which the petitioner participated fully and decisions from that court were *res judicata* on the matters before the district court. Pet. App. 21, 45. The district court denied those motions. Pet. App. 22, 45, 159.

On appeal, the U.S. Court of Appeals for the Ninth Circuit reversed, concluding that the issues involved in the controversy between Pierce and Vickie are integrally related to the probate proceeding in Texas and only tangentially related, if at all, to the bankruptcy proceeding. Pet. App. 35. The court specifically noted that the district court's judgment rested on conclusions, essential to its decision, that the amended testamentary trust which the Texas court had entered into probate was forged and fraudulent—and, therefore, necessarily invalid—all "in direct and irreconcilable conflict with the Texas probate court's judgment." Pet. App. 30. See also Jt. App. 119, 124. The court of appeals held that the case fell within the "probate exception" to federal jurisdiction. The court did not reach arguments respecting issue preclusion, claim preclusion, abstention, and other matters that might independently support the result below. Pet. App. 37.

SUMMARY OF ARGUMENT

The decision that this action is barred by the probate exception to federal jurisdiction is consistent with decisions of this Court. The Court has, for more than a century, recognized an exception to federal jurisdiction for matters within the special competence of state probate courts. The matters at issue in this case are squarely within the ambit of those held previously to be excepted from federal jurisdiction. See, *e.g.*, *Markham v. Allen*, 326 U.S. 490, 494 (1946); *Harris v. Zion Savings Bank & Trust Co.*, 317 U.S. 447, 450 (1943).

The decision below is also consistent with considerations of judicial economy and consistency that support the probate exception to federal jurisdiction. Contests over the assets of decedents generate special problems. In part because the critical evidence of the intention of the decedent cannot be had through live testimony, spurious claims against the assets of decedents are common. Further, many different parties in many jurisdictions potentially can advance claims against a decedent's estate.

For those reasons, contests over decedents' estates generally have been required to be brought within the exclusive jurisdiction of probate courts. Those courts have developed special expertise in dealing with the issues presented in these contests. Committing the contests to a single forum serves to promote consistency as well as judicial economy. Although individual claimants in particular cases will prefer a different forum, as a class donors, charities, and other beneficiaries of gifts and bequests are best served by continued recognition of the exclusive jurisdiction of probate courts.

That exclusive jurisdiction extends to claims that are drafted in language intended to avoid the appearance of contesting a will as well as to more directly pled will contests. It extends equally to claims that are brought into federal court under federal diversity jurisdiction and those that are appended to other federal claims. See *Harris*, *supra*, at 450. In this case, all of the controverted claims are state law claims that are within the exclusive jurisdiction of the state's probate courts.

Recognition of the priority of state probate court jurisdiction over claims such as those at issue here does not in any way infringe federal sovereignty. Congress consistently has chosen not to extend federal judicial jurisdiction to the full extent permitted by the Constitution. In interpreting federal statutory grants of jurisdiction, this Court is giving effect to federal interests. If Congress chooses to draw the lines around

federal judicial jurisdiction differently, it is free to do so. Congress has not, however, expressed a decision to overturn the long-standing judicial construction of an exception to federal jurisdiction for matters within the exclusive domain of state probate courts. Enactment of legislation conferring federal jurisdiction over bankruptcy matters does not direct a contrary result.

The decision below is consistent with decisions of other circuits of the court of appeals. Despite slight variations case to case, the decision below finds support in decisions of the first, second, third, fourth, fifth, sixth, seventh, eighth, tenth, and eleventh circuits. The circuit courts have held that probate contests over testamentary trusts are treated no differently from contests over wills. They have said, as well, that labeling an action as a suit in tort, rather than a direct attack on a testamentary document, does not alter the analysis of the scope of probate court and federal court jurisdiction. No circuit has held that federal jurisdiction extends to core probate matters. One circuit has held that such matters lie outside the scope of a civil rights law. One circuit's bankruptcy appeals panel has held that matters committed to state probate courts are outside federal bankruptcy jurisdiction. Only one circuit decision, from the eleventh circuit, would conflict with the result here, and the conflict with that decision is entirely with *dicta*, not with the court's holding.

Concerns about the scope of the exception as it was articulated by the court below are not relevant to disposition of this case. This case does not involve claims of the United States. It does not involve claims that are within the core competence of bankruptcy courts. Instead, it involves a controversy within the core competence of state probate courts and on which the probate court in Texas had rendered decision prior to the decision of the federal district court.

ARGUMENT

I. CONGRESS DID NOT EXTEND FEDERAL JURISDICTION TO MATTERS WITHIN THE SPECIAL COMPETENCE OF STATE PROBATE COURTS.

A. Precedents recognize the absence of federal jurisdiction over matters specially given to state probate courts.

This Court for more than a century has held that federal judicial jurisdiction does not extend to matters that are within the special competence of state probate courts and are committed by the state exclusively to those courts. See, *e.g.*, *Sutton v. English*, 246 U.S. 199, 205, 207-08 (1918); *Farrell v. O'Brien*, 199 U.S. 89, 110-11 (1905); *In re Broderick's Will*, 88 U.S. (21 Wall.) 503, 511-12 (1875). This Court's decisions draw a distinction between matters that a state commits exclusively to its probate courts (including matters ancillary to probate) and matters that a state authorizes to be brought within the general law or equity jurisdiction of courts not specifically limited to probate and probate-related matters. *Sutton v. English*, *supra*, 246 U.S., at 205; *Farrell v. O'Brien*, *supra*, 199 U.S., at 110. Actions not required under state law to be brought under the exclusive jurisdiction of probate courts, and which would not interfere with the essential functions of probate, are within federal jurisdiction even if they involve similar matters. See, *e.g.*, *Sutton v. English*, *supra*, 246 U.S., at 205-08.

The form of the claim, however, is not dispositive. Claims are not within federal jurisdiction if their disposition turns on adjudication of matters within the exclusive competence of state probate courts, even if they are in the form of suits in tort, bankruptcy, or other causes. See, *e.g.*, *Harris v. Zion Savings Bank & Trust Co.*, 317 U.S. 447, 450-53 (1943).

The two most recent decisions of this Court addressing the relationship between federal jurisdiction and state probate law

illustrate the distinction. *Harris v. Zion Savings Bank & Trust Co.*, *supra*, began as a bankruptcy case. Anna Harris, a farmer, filed for bankruptcy, asked for a composition of debts, then died while the bankruptcy petition was pending. After her death, the bankruptcy court stayed its proceedings, and the Zion Savings Bank later foreclosed on property owned by her. The administrator of her estate sought to revive the bankruptcy proceeding, but the state courts in her home state, Utah, held that her administrator did not have the authority under Utah probate law to petition the bankruptcy court to revive its proceedings.

A provision in federal bankruptcy law (then Section 75 of the Bankruptcy Act), however, specifically stated that representatives of deceased farmers could petition for a composition on behalf of the decedent. Mrs. Harris' administrator asked the federal courts to rule that this provision governed his capacity to make such a filing.

This Court held that the provision did not, contrary to the most direct reading of its terms, confer authority on the administrator that was denied by state probate law. The Court observed that the federal courts historically had read federal law to prevent conflicts or potential conflicts with state probate:

> [T]he federal courts have no probate jurisdiction and have sedulously refrained, even in diversity cases, from interfering with the operations of state tribunals invested with that jurisdiction. . . .

Id., at 451. The Court then explained that a potential conflict between federal bankruptcy law and state probate law existed. Bankruptcy's object is to discharge debts, while probate's object is to distribute proceeds of an estate to rightful claimants. These objects at times might run at cross purposes. The best reading of the federal law, then, as with construction of federal jurisdiction, was one that would prevent a conflict between federal bankruptcy law and state probate law. *Id.*, at

452-53. The Court read the bankruptcy law as implicitly requiring approval from state probate court for the administrator of an estate to petition the bankruptcy court to revive a proceeding. In this way, the potential for conflict was eliminated.

Markham v. Allen, *supra*, presented a very different situation. Under the federal Trading with the Enemy Act, 50 U.S.C. App. §1 et seq., the Alien Property Custodian claimed the right to stand in the place of German citizens who were legatees of a decedent resident of California. Other prospective heirs claimed that German citizens were not eligible to inherit under California law. This Court determined that the question presented was a straight-forward question of federal law that could be decided without interference with the operation of the state probate court. The federal courts could determine the rights of the Alien Property Custodian under the federal statute, irrespective of California law.

In contrast to the present case and other cases held to fall outside federal jurisdiction, *Markham* did not involve questions of will validity or estate administration within the exclusive province of the state probate courts. Nor was there a finding that the issue brought into court by the Custodian presented a conflict with essential determinations of the probate courts.

The test articulated in *Markham* was that federal courts could adjudicate rights in suits between parties so long as the federal court proceeding "does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court." 326 U.S., at 494. The critical part of this test is the interference prong.

This part of the *Markham* test distinguishes that case from the majority of cases that come before the federal courts and from the instant case. The question in *Markham* respecting the Custodian's right to claim the property bequeathed to

German heirs could be decided without conflicting with state probate court proceedings. That is not the case where claims, such as assertions of interference with an expected gift, require courts to assess core issues of probate law. And, as the Ninth Circuit concluded below, it is manifestly not so in the instant case.

Here, Petitioner Vickie Marshall asked the federal court to find the testamentary documents fraudulent and hence invalid, as essential parts of her claim that Pierce tortiously interfered with her expectancy. Pet. App. 42-43. Although decision on that issue is not tantamount to administering the probate estate, and so often will be referred to as a decision that is "ancillary" to the "pure probate" function, it goes to core determinations made by state probate courts. Core probate questions include whether a will was signed by the testator and whether the testator was of sound mental capacity or was subject to undue influence when executing the document(s) being entered into probate.[2] Vickie's claim put these very questions in issue. See, *e.g.*, Jt. App. 119.

Looking past the labels, the test for interference is whether claims require adjudication of issues that lie within the special competence of state probate courts. As Vickie's claims require adjudication of each of the issues noted here as essential determinations of state probate court, her claims fall outside federal jurisdiction under the *Markham* test.

B. Circuit court precedents also support the absence of federal court jurisdiction over matters specially given to state probate courts.

Perhaps uncharacteristically, the Ninth Circuit is in quite good company with its sister circuits in its construction of the

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[2] Rejecting similar claims, the Fourth Circuit observed, "we have not located, a single case in which a federal court has found jurisdiction to invalidate a will due to lack of testamentary capacity or undue influence." *Turja v. Turja*, 118 F.3d 1006, 1009 (4th Cir. 1997).

scope of federal jurisdiction in this case. In assessing whether a federal proceeding would interfere with probate proceedings, the circuits of the court of appeals, in keeping with the approach taken below, have not given primacy to the form of the claim. Instead, they have asked whether the claim in federal court would require the court to address issues that are within the special competence of state probate courts, whether those issues are labeled "ancillary," "pure," or something else. As the circuit decisions cited in this section make plain, claims requiring resolution of issues, such as will validity, that are within the special competence of state probate courts are not within federal jurisdiction.

In *Dragan v. Miller*, 679 F.2d 712 (7th Cir. 1982), cert. denied, 459 U.S. 1017 (1982), for example, the Seventh Circuit held that diversity jurisdiction did not extend to a suit for the tort of intentional interference with an expectancy of a bequest because the arguments necessary to success on such a claim inevitably would implicate issues (such as whether defendant had exercised undue influence over the testator) that are within the special competence of the Illinois probate courts. *Id.*, at 715-17.

The Seventh Circuit again addressed the question of federal jurisdiction over probate-related matters in *Storm v. Storm*, 328 F.3d 941 (7th Cir. 2003). The claim in *Storm* was that defendant tortiously interfered with plaintiff's inheritance expectancy by exercising undue influence over the decedent, persuading her to amend an inter vivos trust. The court, consistent with the decisions of other federal courts, rejected plaintiff's contention that because a trust rather than a will was in issue, the case was not strictly a matter for state probate courts. *Id.*, 328 F.3d at 947 ("causes of action involving trusts are treated under the probate exception in the same way as actions involving wills"). The court also rebuffed plaintiff's argument that a suit for tortious interference with an inheritance expectancy was not strictly a matter for state probate courts. *Id.*, 328 F.3d at 945-47.

In *Moser v. Pollin*, the Second Circuit held that diversity jurisdiction did not extend to tort claims of fraudulent concealment and constructive fraud, even though there was no exclusive jurisdiction in the New York state court that commonly administered probate, because the claims were "in substance nothing more than a thinly veiled will contest." 294 F.3d 335, 340-41 (2d Cir. 2002). The conclusions that would support the claim there would also have had the effect of undermining the validity of the will. Because that issue was being contested in the state court charged with probate of the will, construing federal jurisdiction as extending to the equivalent claim would impermissibly interfere with the state court's proceeding. Even if in form the state probate court could retain jurisdiction over the distribution of the estate, it would not decide a critical matter normally adjudicated in probate court. According to the circuit court, turning "a state probate court proceeding into a rubber-stamping enterprise exemplifies the kind of jurisdictional conflict that is to be avoided by means of the interference prong of the probate exception." *Id.*, at 342-43 (footnote omitted).

In the case before this Court, as in the *Moser* case, *supra*, the validity of testamentary documents is at issue in both the federal court proceeding and state probate court proceeding. The claims that the district court here thought fell within its competence could not be resolved without findings that go directly to the issue of document validity, which is also a core element of the state probate proceeding. See Pet. App. 30. See also *Blakeney v. Blakeney*, 664 F.2d 433, 434 (5th Cir. 1981) (claim that testator "lacked capacity to make a will goes to the validity of the will itself"); *McKibben v. Chubb*, 840 F.2d 1525, 1530 (10th Cir. 1988) ("when a claim is brought charging undue influence or fraud in the execution of a will, that action is ancillary to the challenge of the will and belongs in the Kansas probate proceedings, not in federal court").

The findings of the district court are in clear conflict with the findings of the state probate court. The risk of such conflict is present whenever a federal court endeavors to answer questions that are within the core competence of state probate courts and inevitably will be decided in that context.

The Ninth Circuit's decision here is consistent with other circuit court decisions, establishing: that actions challenging matters within the special competence of state probate courts are outside federal jurisdiction, even if the suit is cast as a tort action, *Lepard v. NBD Bank*, 384 F.3d 232, 237-38 (6th Cir. 2004); *Golden ex rel. Golden v. Golden*, 382 F.3d 348, 359-63 (3d Cir. 2004); *Storm, supra*, 328 F.3d, at 945-47; *Rienhardt v. Kelly*, 164 F.3d 1296, 1300-01 (10th Cir. 1999); *Turja v. Turja*, 118 F.3d 1006, 1009-10 (4th Cir. 1997); that the interference prong of *Markham* is to be interpreted with an eye to practical notions of interference rather than a narrow, technical view of probate administration, *Lepard, supra*, 384 F.3d, at 237-38; *Golden, supra*, 382 F.3d, at 357-60; *Stanis v. Jensen*, 294 F.3d 994, 998-99 (8th Cir. 2002); *Moser, supra*, 294 F.3d, at 341-43; *Breaux v. Dilsaver*, 254 F.3d 533, 535-37 (5th Cir. 2001); *Mangieri v. Mangieri*, 226 F.3d 1, 2-3 (1st Cir. 2000), cert. denied, 531 U.S. 1080 (2001); *Glickstein v. Sun Bank/Miami*, 922 F.2d 666, 673 (11th Cir. 1991); and that the use of trusts rather than wills as the instrument for distribution of estate assets does not render a suit subject to federal jurisdiction, *Lepard, supra*, 384 F.3d, at 237; *Golden, supra*, 382 F.3d, at 359-63; *Storm, supra*, 328 F.3d, at 947; *Georges v. Glick*, 856 F.2d 971, 974 (7th Cir. 1988), cert. denied, 489 U.S. 1097 (1989).

These courts all have been quite clear that the matters excluded from federal jurisdiction are not merely the mechanical aspects of probate administration but all decisions on matters within the special competence of the state probate courts that implicate core issues such as will validity, even if the challenge is presented in a form designed to mask that relation. The circuit courts also have declared that federal

jurisdiction does not attach to such matters, whether the probate action is pending or is completed, where the federal claim amounts to either a substitute for or a collateral attack on determinations critical to the validity issues committed to state probate courts. See, *e.g.*, *Rienhardt v. Kelly, supra*, 164 F.3d, at 1301; *Turja v. Turja, supra*, 118 F.3d, at 1008-10; *Blakeney v. Blakeney, supra*, 664 F.2d, at 434; *Starr v. Rupp*, 421 F.2d 999, 1003-07 (6th Cir. 1970).

II. PARTICULAR CONCERNS WITH MATTERS SPECIALLY GIVEN TO STATE PROBATE COURTS SUPPORT DECISION THAT THERE IS NO FEDERAL JURISDICTION.

A. Special concerns attach to disposition of decedents' assets.

Particular concerns affecting the matters within the exclusive jurisdiction of state probate courts counsel against construing federal jurisdiction to reach these matters. Probate matters generally concern the intention of one who is deceased and, thus, cannot clear up any questions concerning his intention. This fact may account for the frequency of contests over the estates of decedents.

A second complication arises from the fact that planning for disposition of one's assets on death almost inevitably occurs well in advance of the time of death. The plan, thus, must be made in the understanding that many unforeseen events could alter the effect of the plan. Although estate planning documents are drafted and executed with that understanding, the passage of time inevitably provides additional grist for arguments over the meaning of those documents.

Third, the set of persons who have close connections to a decedent and who might hope for some tangible recognition of that connection in the estate plan often will be large and encompass individuals living in many different jurisdictions.

Often potential claimants will be found in foreign nations as well as in many different states within the United States.

Individuals who are planning for the disposition of their assets and wish to have that disposition carried out in accordance with their intentions—whether they are persons of great wealth or of modest means— are concerned with giving effect to their intent. Those concerns are central to the creation and operation of amicus.

B. Interests in legal consistency and judicial economy support special jurisdiction of state probate courts.

The special problems attached to the disposition of assets at death help explain the survival of special legal forms and tribunals for addressing probate related matters. In order to provide greater certainty and finality to the disposition of decedents' assets, states commonly provide for a single proceeding to bring into court decedents' assets and to dispose of all claims to those assets. Without such a proceeding, questions respecting the disposition of a decedent's assets could stretch over many years in many disparate locales.

By centralizing all claims in a single court and providing a specialized body of judges to dispose of the claims, states accomplish three goals.

First, states achieve a measure of judicial economy. Issues that will have to be addressed in contests over the disposition of probate assets can be handled by judges who develop expertise in those matters. These include not merely the mechanical and administrative aspects of probate, but more importantly the issues related to contests over the disposition of the assets. So, for example, states commonly require that claims relating to trust instruments designed to take effect on the death of the grantor and claims relating to allegedly tortious conduct interfering with the realization of expectancies for gifts or bequests must be brought in probate court.

See, *e.g.*, Tex. Prob. Code §5A. States do not allow such claims to be used in collateral attacks on probate judgments. See, *e.g.*, *Thompson v. Deloitte & Touche*, 902 S.W.2d 13 (Tex. App. 1995).

Second, states provide greater assurance of consistency in the law. The commitment of matters to a select set of judges who deal with the same issues repeatedly accomplishes that end.

Third, states also provide greater assurance that decedent's wishes will be given effect. This is accomplished both by increasing the consistency of decisions and by bringing all matters before a set of tribunals that have expertise in the relevant legal issues of the particular jurisdiction whose law should govern disposition of a given decedent's estate.

Individuals plan the disposition of their assets in reliance on provisions in a particular state's law. The ability to plan is advanced when the individuals and those who draft documents for them can know which state law will apply to questions respecting the disposition and know as well that the judges most familiar with the particular body of law will be interpreting and applying it.

These considerations support the states' decisions to vest exclusive jurisdiction over issues critical to probate in the specialized probate courts. See, *e.g.*, Mich. Comp. L. Ann. §700.1302; Oh. R.C. §2101.21; Tex. Prob. Code §5A. The considerations also explain why states routinely require that matters such as claims of tortious interference with an inheritance expectancy must be brought in probate court. The requirement avoids the conflicts, delays, and inconsistencies that are more likely to attend litigation of matters in different courts, even within a single state.

C. Considerations of legal consistency and judicial economy support the probate exception to federal jurisdiction.

The very same considerations support the historic interpretation of federal jurisdiction as excluding matters within the exclusive province of state probate courts. For example, Judge Posner, writing for the Seventh Circuit, after questioning the historicist explanation for exclusion of probate matters from federal jurisdiction, even in diversity cases where some fear of bias against non-resident parties might attach, explains that considerations of judicial economy and consistency support the exclusion. *Dragan v. Miller*, *supra*, 679 F.2d, at 714-16. See also *Lepard v. NBD Bank*, *supra*, 118 F.3d, at 237. Indeed, the Seventh Circuit in *Dragan* thought that these arguments against the exercise of federal jurisdiction were powerful enough to support the exclusion of core probate matters from federal jurisdiction even where the state did not have separate, specialized probate courts.[1] *Id.*, at 715-17.

An alternative approach to the protection of interests in consistency and judicial economy — invocation of doctrines of claim preclusion, issue preclusion, and *res judicata* — fails to provide the same protection of these interests. Respondent in the instant case, Pierce Marshall, raised these doctrines in the alternative, and the doctrines do, indeed, provide some protection to interests in consistency and economy. Application of these doctrines, however, frequently raises difficult issues, and parties cannot rely with certainty on these doctrines adequately to protect interests in consistency and economy.

Beyond that point, there is a more serious problem with this approach. By making the first determination on the

[1] This Court similarly found that considerations of judicial economy supported the judicial construction of a "domestic relations" exception to federal jurisdiction. See *Ankenbrandt v. Richards*, 504 U.S. 689, 703-04 (1992).

merits dispositive, reliance on these doctrines encourages the sort of forum-shopping and race-to-judgment that undermines certainty and predictability critical to meaningful planning for disposition of estates.

The risk of forum-shopping is illustrated by the instant case. Vickie filed claims in Texas as a Texas resident only a few months before filing a bankruptcy petition in California as a California resident. Jt. App. 26; Pet. App. 11-12, 41. The bankruptcy petition on its face states that the filing is prompted by her failure to inherit from J. Howard and by a debt that was not contested by her prior to the bankruptcy petition but that was subsequently settled between the parties after invoking bankruptcy jurisdiction. These facts together give the proceeding the clear appearance of manipulating bankruptcy in an effort to find a friendly forum for a second chance at contesting core probate issues.

It bears repeating that the probate setting presents special reasons for concern. The individual who is planning the disposition knows he will be unable to testify in person during any contest over his disposition. He will be unable after a contest to revise his legal instruments to give effect to his intentions or otherwise to adjust to possible misinterpretations of his intent. In these circumstances, predictability and certainty are especially important concerns. The commitment of matters to a particular, specialized forum uniquely safeguards the interests of the testator.

The construction of federal jurisdiction as excluding matters within the special competence of state probate courts protects these interests. It harmonizes federal and state interests in accord with the historic understanding of the role courts in each jurisdiction have properly performed. Amicus is especially concerned that this Court preserve a construction of law that allows donors to plan with some certainty the disposition of their assets.

III. ABSENCE OF JURISDICTION FOR MATTERS SPECIALLY GIVEN TO STATE PROBATE COURTS IS CONSISTENT WITH OTHER DOCTRINES.

A. Federal jurisdiction is limited and does not extend to all possible causes.

Far from being an extraordinary construction of federal jurisdiction, this Court's cases respecting probate issues are in keeping with other decisions respecting jurisdiction, the exercise of federal judicial power, and the exercise of other federal powers. Arguments that begin with the assumption that federal judicial jurisdiction must, absent the clearest instruction to the contrary, be interpreted to extend to its fullest possible reach misstate the law. To be sure, this Court has determined that the Congress cannot constitutionally constrict the exercise of the Court's original jurisdiction, but the remainder of the federal court's jurisdiction lies within the power of the political branches to authorize or withhold. See, *e.g.*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174-75 (1803); *Ex Parte McCardle*, 74 U.S. (7 Wall.) 506, 514-15 (1869).

Although Congress historically has granted federal courts authority over substantial portions of the potential federal judicial jurisdiction, it has never granted full authority over that jurisdiction. The decision not to grant federal courts jurisdiction over the full extent of potential federal cases is illustrated by the courts' diversity jurisdiction, which from the Judiciary Act of 1789 to the present has been restricted to cases with a given dollar amount in controversy. See, *e.g.*, 28 U.S.C. §1332(a).

B. Doctrines require courts to avoid unnecessary interference with state proceedings.

Not only is the scope of federal judicial power constrained, it also is not mandatory that courts exercise the full extent of

their statutorily granted jurisdiction. Even when jurisdiction clearly exists, this Court has found that prudential considerations counsel withholding decision. Notwithstanding occasional dicta to the contrary, numerous holdings of this Court direct the federal courts to stay their hand, temporarily or permanently, because proceedings implicate matters within the special competence of state courts. Under various abstention doctrines, for example, federal courts withhold decision on matters that might unduly infringe on decisions of state courts or might unnecessarily draw federal courts into constitutional questions. See, *e.g.*, *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817-20 (1976); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983); *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923).

The abstention doctrines reveal this Court's concerns for both judicial economy and the consistency of the law. Those concerns justify withholding the exercise of federal jurisdiction that is conceded to exist in order to reduce the potential costs of multiple proceedings, the potential conflicts between tribunals considering duplicative claims, and the potential inconsistencies in legal rulings that might attach to disposition of matters within the core competence of state courts by federal courts. The same considerations support the construction of federal jurisdiction as not reaching matters within the special competence of state probate courts, as discussed above in Part II of this Argument. Similarly, concerns of federalism and comity counsel leaving matters within the special competence of state probate courts to those tribunals, just as those considerations argue for abstention in the cases noted above. See, *e.g.*, *Golden ex rel. Golden v. Golden*, *supra*, 382 F.2d, at 358 n.10; *Moore v. Graybeal*, 843 F.2d 706, 710 (3d Cir. 1988).

C. Aspects of state law often affect the scope of federal rights and federal jurisdiction.

The Solicitor General, in his amicus brief in this case, suggested that the decision of the Ninth Circuit below is inconsistent with the law because it would make the scope of federal jurisdiction turn in part on state law. *Brief for United States as Amicus Curiae Supporting Petitioner*, at 12-13. The exact pedigree of this complaint it is not clear.

As a starting point, it cannot be disputed that federal law often makes the effective scope of federal rights and obligations turn on aspects of state law. To take one example, federal tax law allows deductions for certain state tax payments. See, *e.g.*, 26 U.S.C. §§164(a), 164(b). The value of the deduction obviously varies according to the level and nature of state tax payments, matters entirely within the control of the states. This fact has never been deemed to raise any question of sovereignty, as the decision to allow state law to affect what is paid to the federal government is a decision of federal law.

There is no reason to view the decision to withhold federal jurisdiction from disposition of core issues committed to the special competence of state probate courts – any more than the decision to allow decisions of state tax law to affect federal tax payments – as a threat to federal sovereignty. See, *e.g.*, *Sutton v. English*, *supra*, 246 U.S., at 205-06, 207-08; *Ellis v. Davis*, 109 U.S. 485, 494, 499 (1883); *In re Broderick's Will*, *supra*, 88 U.S., at 511-12. The same should be said of the abstention doctrines noted above, and indeed the United States admits that these doctrines properly preclude federal courts from taking certain actions that would undermine the operation of state probate court jurisdiction. *Brief for United States*, *supra*, at 15-16.

The decision of the federal government to allow matters to be decided in state courts when interests in judicial economy and consistency support withholding federal jurisdiction is in

no way at odds with the supremacy of national law. National supremacy is no more in issue when jurisdiction is withheld as a matter of interpretation of the scope of a statutory grant of jurisdiction than where the decision rests on prudential considerations within the discretion of a court. In either case, although showing respect for state law, the decision is one of the national government.

The states could not, of course, constrict federal judicial jurisdiction by overriding a federal law. State grants of exclusive jurisdiction to the probate courts would not, independent of the construction of federal law, constrain the judicial power of the federal courts. See, *e.g.*, *Hess v. Reynolds*, 113 U.S. 73, 77 (1885). However, the fact that a state's decisions – including decisions on the scope of matters committed to the special jurisdiction of its probate courts – affect the ambit of federal judicial jurisdiction as a matter of federal law does not provide any reason to question the decision below.

D. Even under the narrowest construction of the probate exception, federal jurisdiction would not attach in this case.

Although the test for federal jurisdiction over probate matters advocated by the Solicitor General is narrower than the test adopted by this Court – and narrower than the test used in any circuit court – the decision in the instant case actually fits within the ambit of cases the United States agrees fall outside a proper exercise of federal jurisdiction. The state probate proceeding in this case was concluded before the decision of the district court was rendered,[4] and the district

[4] The district court vacated the judgment of the bankruptcy court following the conclusion of the probate court proceeding in Texas. Pet. App. 186. The final judgment in probate court was December 7, 2001. Pet. App. 106-40. The federal district court did not enter its final judgment until March 7, 2002. Pet. App. 141-42.

court's decision here—like the decisions addressed in cases such as *Sutton v. English*, *supra*—was clearly in conflict with the already rendered judgment of the state probate court and would have the effect of invalidating the very instruments that the state court declared valid.[5] Pet. App. 30. As eleven circuits of the court of appeals have recognized, in such instances the proper understanding is that Congress has decided not to authorize the exercise of federal jurisdiction. See cases cited, *supra*, in Part I.b.

IV. BANKRUPTCY JURISDICTION DOES NOT IMPOSE A DIFFERENT RULE FROM DIVERSITY JURISDICTION.

The considerations that support this Court's—and all of the circuit courts'—construction of federal jurisdiction as excluding matters within the special competence of state probate courts apply equally to federal diversity jurisdiction and other sources of federal jurisdiction. The overwhelming majority of cases raising the issue of the relation of federal jurisdiction and state probate jurisdiction are diversity cases. Courts and commentators, hence, often refer to the absence of federal jurisdiction as "the probate exception to diversity jurisdiction." See, *e.g.*, *Golden ex re. Golden v. Golden*, *supra*, 382 F.3d, at 357; *Dragan v. Miller*, *supra*, 679 F.2d, at 713; Note, *A Prudential Exercise: Abstention and the Probate Exception to Federal Diversity Jurisdiction*, 104 Mich. L. Rev. 134 (2005).

However, nothing in the nature of the exception or in the considerations of legal consistency and judicial economy that support the exception is limited to the exercise of diversity jurisdiction.[6] Federal court determinations on core probate matters such as the validity of a will, whether made under diversity jurisdiction, bankruptcy jurisdiction, or general federal question jurisdiction, work the same interference with interests in consistency and judicial economy.

On the rare occasions when matters within the special competence of state probate courts have come forward under bases for federal jurisdiction other than diversity, the courts have recognized that federal law should be interpreted to avoid conflict with the state probate determinations. *Harris v. Zion Savings Bank*, *supra*, quite clearly evidences this recognition. This Court expressly interpreted bankruptcy law to avoid conflict with state probate court determinations, despite the fact that the bankruptcy filing antedated the probate filing and a specific provision in the bankruptcy law addressed the very matter in issue. 317 U.S., at 451-53.

When this Court declared that federal courts "have sedulously refrained, *even in diversity cases*, from interfering with the operations of state tribunals invested with" probate jurisdiction, *id.*, at 451 (emphasis added), it clearly signaled that the same considerations apply outside the diversity context. Indeed, the implication in that statement is that the considerations apply more outside the diversity context, as diversity jurisdiction is justified in large measure by concerns about local court bias, concerns that do not similarly support other bases of federal jurisdiction. See, *e.g.*, *Bank of the United States v. Deveaux*, 5 Cranch (9 U.S.) 61, 87 (1809).

If there was any question about the conclusion that the Court was deciding that probate jurisdiction did—and bankruptcy jurisdiction did not—obtain to determine matters

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[5] The district court found three pages of the probated trust to be fraudulent, including the signature page for the trust. Pet. App. 126.

[6] Judge Frank Easterbrook, writing for the Seventh Circuit, reached a similar conclusion respecting application of the domestic relations exception to cases arising under federal question jurisdiction. See *Hicks v. Duffy*, 827 F.2d 234, 238-39 (7th Cir. 1987). While the scope of that exception differs from the scope of the probate exception, similar considerations support the conclusion that the exclusion from federal jurisdiction does not apply solely to diversity jurisdiction.

within the special competence of the probate tribunal, the Court put that to rest when it added:

> "The probate court, not the bankruptcy court, is the appropriate forum for weighing the respective benefits or detriments to those who share in the equity of the decedent's estate.

317 U.S., at 452.

Similarly, in *Tonti v. Petropoulous*, 656 F.2d 212 (6th Cir. 1981), the court of appeals for the Sixth Circuit held that it lacked jurisdiction over claims respecting probate matters that were committed to and had been resolved in the probate court of Ohio. The basis for jurisdiction claimed in *Tonti* was federal question jurisdiction over claims of civil rights violations, brought under 42 U.S.C. §1983. Plaintiff alleged fraud, collusion, and denial of fair trial rights due to state judges' bias. The circuit court declared that, under the precedents of this Court and the circuit courts, probate matters are not within federal jurisdiction. *Id.*, 656 F.2d, at 215. The court's flatly stated conclusion applies the same rule to federal question jurisdiction as to diversity jurisdiction.

The bankruptcy appeals panel for the Eighth Circuit, in *In re Lutzinger*, 322 B.R. 108 (8th Cir. BAP (Mo.) 2005), raised the issue of its jurisdiction sua sponte. In doing this, the Panel determined that the probate exception applied to bankruptcy proceedings just as it does to proceedings based on other provisions for federal jurisdiction. Holding that the *Markham* test applied to bankruptcy proceedings before it without qualification, the court remanded the case to the bankruptcy court with instructions to vacate its order and consider the application of the interference prong of *Markham*. 322 B.R., at 116-17. The wife of decedent's nephew had filed for bankruptcy while probate proceedings were pending. The Appeals Panel found that a critical predicate for the bankruptcy court order was determination of

ownership of certain assets. Depending on the outcome of that determination, these assets might be included within the decedent's probate estate or excluded from it. 322 B.R., at 117. The Panel therefore held that the bankruptcy court needed to determine if decision of the controversy before it would impermissibly interfere with state probate proceedings. If so, that matter was outside the jurisdiction of the bankruptcy court. *Id.*

The application of this Court's *Markham* test to bankruptcy proceedings is consistent with the Court's precedents and also with the concepts that underlie those precedents. See, *e.g.*, William L. Norton, Jr., *Norton Bankruptcy Law and Practice 2d* §4:71 (2006). Construction of federal jurisdiction as excluding matters that go to essential aspects of probate law—to matters that are committed exclusively to probate courts or that functionally are placed within their special competence—promotes legal consistency and judicial economy just as much when bankruptcy jurisdiction is at issue as when diversity jurisdiction is at issue.

Nothing in the bankruptcy law is to the contrary. The bankruptcy code includes an express provision for abstention to allow resolution of issues related to bankruptcy in state court proceedings. 28 U.S.C. §1334(c). That provision does not speak to probate proceedings directly or in any way signal a design to alter the rule that federal jurisdiction does not attach to claims within the special jurisdiction of state probate courts. The abstention provision of §1334(c) addresses a broad range of possible state court actions that might better be resolved apart from bankruptcy and allows district courts to determine whether abstention would be "in the interest of justice, or in the interest of comity with State courts or respect for State law." 28 U.S.C. §1334(c)(1). See also 28 U.S.C. §1334(c)(2). So, for example, abstention might be requested to allow a contract dispute between parties to be resolved in state court, see, *e.g.*, *In re Casual Male Corp.*, 317 B.R. 472 (S.D.N.Y. 2004), or to allow prosecution of contempt

proceedings arising out of a domestic relations dispute, see, *e.g.*, *In re Moon*, 211 B.R. 483 (S.D.N.Y. 1997). This provision indicates Congressional concern over matters related to comity and federalism, and arguably is supported by the sort of concerns with consistency and judicial economy that support exclusion of issues within the special competence of probate courts from federal jurisdiction.

The abstention provision in the Bankruptcy Code, however, does not reverse that exclusion. It solely addresses circumstances in which there is admitted federal jurisdiction over a claim. It does not discuss the historic construction of federal jurisdiction as excluding matters within the special competence of probate courts and does not suggest a design to supersede probate court determinations of core probate issues, such as the validity of testamentary documents. If the law's drafters had intended that result, it is reasonable to expect that they would have said so directly. In short, nothing in the Bankruptcy Code itself provides sufficient ground to overcome the long-standing construction of federal jurisdiction as excluding such matters.

The one case that expresses a contrary conclusion is *Goerg v. Parungao*, 844 F.2d 1562, 1565 (11th Cir. 1988), cert. denied, 488 U.S. 1034 (1989). This case does not, on inspection, provide any basis for that conclusion. The *Goerg* case is a contest not between U.S. bankruptcy and probate jurisdiction, but between foreign and U.S. jurisdiction. The question in *Goerg* was whether the trustee of a foreign citizen was a "debtor" within the meaning of Section 304 of the U.S. Bankruptcy Code, 11 U.S.C. §304, a provision dealing with disposition of assets related to a foreign bankruptcy proceeding. Goerg, the German bankruptcy trustee, sought to enjoin U.S. proceedings and to include decedent's assets in the German proceeding. In passing, the Eleventh Circuit stated that the probate exception affects only the scope of diversity jurisdiction. *Id.*, 844 F.2d at 1565. The issue was not essential to the decision of the case. It was not the ground

on which the bankruptcy court had ruled that it lacked authority to issue the injunction sought by Goerg. The dictum in *Goerg* is in conflict with authority of this Court, with other lower court decisions,[7] and with the legal concepts that underlie this Court's interpretation of the scope of federal jurisdiction.

V. NO SPECIAL CIRCUMSTANCE COUNSELING LIMITATION ON THE PROBATE EXCEPTION IS IN ISSUE.

The brief of the Solicitor General argues that there is a special circumstance when claims of the United States, or claims against the United States, are in issue and special reasons to allow a federal forum for such claims. Concerns respecting forum-shopping (and related conduct designed to divert matters from a potentially unfavorable state probate venue) seem to apply solely to private parties and not to the United States. That observation would seem to support a different rule at least for claims by the United States. That issue, however, need not be addressed, as this case does not involve either claims by the United States or against the United States.

Although the Solicitor General questions the provenance and historic scope of the probate exclusion from federal jurisdiction, even judges who have shared those concerns have concluded that "it is too well established a feature of our federal system to be lightly discarded." *Dragan v. Miller*, *supra*, 679 F.2d, at 713. See also *Meier v. Pollin*, *supra*, 294 F.3d, at 340; *Ashton v. Josephine Bay & C. Michael Paul Found., Inc.*, 918 F.2d 1065, 1072 (2d Cir. 1990). Congress

[7] The opinion also conflicts with the Eleventh Circuit's decision in *Glickstein v. Sun Bank/Miami*, *supra*, which applied the *Markham* analysis to a RICO action, finding that there would be no interference because there was no issue of will interpretation or will validity and no prospect of interfering with probate proceedings. 922 F.2d, at 673.

has adopted numerous provisions respecting federal jurisdiction in the more than 125 years that this exclusion has been recognized without once declaring it to be an incorrect reading of federal statutes or indicating an intent to alter that construction of federal law. Precedents of this Court give weight to congressional re-enactments of law that do not alter prior constructions. See, *e.g.*, *Ankenbrandt v. Richards*, 504 U.S. 689, 703-04 (1992).

As explained above, the exclusion is supported by strong public interests and by long history in this and other courts. Even if there were compelling reason for that to be changed, the initiative should lie with Congress, not the courts, to do so.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

VICKIE LYNN MARSHALL,

Petitioner,

v.

E. PIERCE MARSHALL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR AMICI CURIAE PROFESSORS OF LAW ERNEST A. YOUNG AND HEATHER ELLIOTT IN SUPPORT OF RESPONDENT

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1 *Collier on Bankruptcy* ¶ 3.01[4][c] (15th ed. rev. 2005) 18, 19
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Amici curiae Ernest A. Young and Heather Elliott respectfully submit this brief supporting affirmance of the judgment below.[1]

INTEREST OF AMICI

Amici are law professors who teach and write on topics including federal jurisdiction and federalism and have a professional interest in the proper application and development of the law in these areas. Ernest A. Young is the Judge Benjamin Harrison Powell Professor in Law at the University of Texas School of Law and has written widely on federal jurisdiction, federalism, and constitutional and statutory interpretation. Heather Elliott is Assistant Professor of Law at the Columbus Law School at Catholic University of America, where her teaching and research focus on federal jurisdiction, federalism, and structural constitutional law.

INTRODUCTION AND SUMMARY OF ARGUMENT

"[F]ederal courts have no probate jurisdiction." *Harris* v. *Zion Sav. Bank & Trust Co.*, 317 U.S. 447, 450 (1943). This Court has made that point clear in an unbroken line of cases stretching back over a century and a half. As this Court has explained, because "the settlement and distribution of decedents' estates . . . are peculiarly matters of state law," federal jurisdiction over state-law disputes has consistently been construed to exclude matters whose adjudication would "interfer[e] with the operations of state tribunals invested with [probate] jurisdiction." *Id.* Such impermissible interference is present when a federal court is asked to probate a will, to administer a decedent's estate, or to entertain an action that challenges the validity of a decedent's estate plan or assails the judgment of a probate court, when state law reserves that proceeding exclusively to a probate court.

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than amici and their counsel made any monetary contribution toward the preparation or submission of this brief. The parties have granted blanket consent for the filing of amicus briefs.

Like the related limitation on federal jurisdiction over divorce, alimony, and custody matters—reaffirmed by this Court in *Ankenbrandt* v. *Richards*, 504 U.S. 689 (1992)—the probate limitation reflects the common-sense proposition that jurisdictional statutes must be read in light of "our dual system of government," *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531, 544 (1994). Respect for that dual system and the primacy of state law in probate matters compels the conclusion that—absent affirmative reason to believe that Congress intended otherwise—a general grant of federal jurisdiction must not be construed so fundamentally to upset the historic role of state courts in probate proceedings.

Nothing in the grant of bankruptcy jurisdiction signals such an intent. In order to encourage efficient administration of the bankruptcy estate, Congress extended bankruptcy jurisdiction beyond matters arising under the Bankruptcy Code or in a bankruptcy case to encompass proceedings—such as petitioner's claim against respondent—that arise solely under state law but are "related to" the bankruptcy case. There is, however, no indication in the text or legislative history of the statute that, in doing so, Congress intended to abrogate the long-settled exclusion of probate and domestic relations matters from federal jurisdiction.

Moreover, because both diversity jurisdiction and bankruptcy "related to" jurisdiction permit federal courts to hear a limited class of matters arising solely under state law, the federalism and comity concerns created by construing those statutory grants of jurisdiction to encompass probate matters are essentially identical. There is accordingly no reason to believe Congress would have intended the "related to" jurisdiction to encompass probate matters excluded from diversity jurisdiction. Indeed, it would be anomalous, even irrational, to conclude that Congress intended federal bankruptcy courts to be the only courts in the federal judiciary with jurisdiction to probate wills or grant divorces.

In *Harris*, this Court held that the bankruptcy laws must be construed in light of the established principle that probate matters are "peculiarly matters of state law." 317

U.S. at 450. That principle applies with equal force to the grant of "related to" jurisdiction in the present-day Bankruptcy Code. The Court of Appeals here correctly concluded that entertaining petitioner's state-law probate claim in bankruptcy court would be a sharp departure from a long-established limitation on federal jurisdiction and would offend the principles of federalism and comity that underlie that limitation.

ARGUMENT

I. FEDERAL COURTS LACK JURISDICTION TO ENTERTAIN ACTIONS THAT WOULD INTERFERE WITH STATE COURT PROBATE PROCEEDINGS

A. This Court Has Long Held That Federal Courts Have No Jurisdiction Over State-Law Probate Claims Whose Adjudication Would Interfere With State Court Probate Proceedings

1. For over one hundred fifty years, this Court has recognized that probate matters—like divorce, alimony, and child custody proceedings—are within the special province of the states and that federal courts therefore lack jurisdiction over actions that would interfere with state court probate proceedings. As this Court explained in a 1943 case construing the bankruptcy laws, "the settlement and distribution of decedents' estates and the right to succeed to the ownership of realty and personalty are peculiarly matters of state law." *Harris* v. *Zion Sav. Bank & Trust Co.*, 317 U.S. 447, 450 (1943). Accordingly, "federal courts have no probate jurisdiction and have sedulously refrained . . . from interfering with the operations of state tribunals invested with that jurisdiction." *Id.*

This Court's opinions make clear that adjudication of a probate-related claim by a federal court creates such impermissible interference, at a minimum, when adjudication of the claim requires the federal court (1) to decide whether a will should be admitted to probate, *see, e.g.*, *Tarver* v. *Tarver*, 34 U.S. (9 Pet.) 174 (1835); *Armstrong* v. *Lear*, 25 U.S. (12 Wheat.) 169 (1827); (2) to assume control over prop-

erty over which a state probate court is already exercising *in rem* jurisdiction, *see, e.g.*, *Williams* v. *Benedict*, 49 U.S. (8 How.) 107 (1850); or (3) to invalidate a will or other testamentary instrument or set aside the judgment of a probate court, when applicable state law permits the claimant to seek such relief only through probate proceedings, *see, e.g.*, *Sutton* v. *English*, 246 U.S. 199 (1918); *Farrell* v. *O'Brien*, 199 U.S. 89 (1905); *Case of Broderick's Will*, 88 U.S. (21 Wall.) 503 (1874); *Fouvergne* v. *New Orleans*, 59 U.S. (18 How.) 470 (1855).

Initial probate of wills. The principle that federal courts have no jurisdiction to probate wills was first established in 1827 in *Armstrong* v. *Lear*, 25 U.S. (12 Wheat.) 169, and has never been questioned by this Court. *Armstrong* affirmed the dismissal of a plaintiff's suit to establish the validity of a will under which he claimed title to the testator's assets, observing that jurisdiction over the probate of wills of personalty rested exclusively in the state probate courts. *See id.* at 176. A long line of cases has followed *Armstrong*'s teaching, from *Tarver* v. *Tarver*, 34 U.S. (9 Pet.) 174 (1835), to the most recent case to address the question, *Markham* v. *Allen*, 326 U.S. 490, 494 (1946) (observing that "a federal court has no jurisdiction to probate a will").

Administration of estates. This Court has also held from an early date that a federal court lacks jurisdiction to grant relief involving a decedent's estate when that estate is already being administered by a state probate court. In *Williams* v. *Benedict*, 49 U.S. (8 How.) 107 (1850), for example, the Court refused to permit a judgment creditor to execute against the assets of an insolvent decedent because the probate court was already exercising *in rem* jurisdiction over the assets, and the probate court alone could control the disposition of those assets. *See id.* at 112; *see also, e.g.*, *Byers* v. *McAuley*, 149 U.S. 608, 613 (1893) (addressing "the question [of] the power of the [federal] circuit court . . . to interfere with the administration of an estate in a state court" and concluding that the federal courts had no such power). *Markham* reaffirmed that principle as well, noting that a

federal court has no jurisdiction to "administer an estate." 326 U.S. at 494.

Other interference with probate proceedings. This Court has not, however, construed the probate limitation as applying only in cases where the federal court is called on actually to probate a will or administer a decedent's estate. Rather, it has recognized that federal courts also lack jurisdiction over actions that seek to invalidate a will or other testamentary instrument or set aside the judgment of a probate court, when under state law the plaintiff can obtain such relief only in the probate court.

This Court recognized that principle as early as 1850, in *Fouvergne*, holding that there was no federal jurisdiction over an action seeking to invalidate a will:

> The courts of the United States have no probate jurisdiction, and must receive the sentences of the courts to which the jurisdiction over testamentary matters is committed, as conclusive of the validity and contents of a will; an original bill cannot be sustained upon an allegation that the probate of a will is contrary to law. If any error was committed in allowing the probate, the remedy is in the state courts, according to their appropriate modes of proceeding ....

59 U.S. (18 How.) at 473.

That holding has been reiterated many times since. Thus, in *Broderick's Will*, this Court refused to set aside the probate of a will, explaining that when the question on which the parties' rights depends is "the establishment or non-establishment of the will," the matter is "entirely and exclusively within the jurisdiction of the Probate Court" of the state. 88 U.S. (21 Wall.) at 517. Similarly, in *Farrell* v. *O'Brien*, this Court held that federal courts had no jurisdiction to entertain a proceeding alleging that a will was invalid because, under the law of the state of Washington, such a proceeding was one "ancillary" to probate and could be brought only in the probate court. *See* 199 U.S. at 116. And, in *Sutton* v. *English*, the Court held that federal courts could

not hear a suit alleging that defendants had exercised undue influence to persuade the decedent to make a will in their favor; because the suit was, "in an essential feature, a suit to annul the will," and because under Texas law such suits were cognizable only in the probate court, it fell outside federal jurisdiction. 246 U.S. at 208.

A long line of cases thus establishes that, where state law requires such relief to be sought in probate court, an action seeking to adjudicate the validity of a decedent's estate plan or to attack the judgment of a probate court would impermissibly interfere with the operations of state probate and is therefore beyond federal jurisdiction.[2]

Respondent's brief explains that petitioner's claim here falls into that category. Although her claim is styled one for tortious interference with expectancy of a gift, it is in effect a challenge to the validity of J. Howard's estate plan as determined by the Texas probate court: at bottom, the question posed by petitioner's claim is whether J. Howard intended to give certain assets to her or instead—as the Texas probate court found—to dispose of those assets as provided

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[2] The analysis does not change when, as here, the decedent's primary testamentary instrument is a trust that is acting as a will substitute. As the courts of appeals have recognized, when used in this manner, the trust is no less integral to the decedent's estate than a will, and federal adjudication of the validity of the trust would interfere with state probate proceedings as profoundly as when the estate-planning instrument is a will. *See Golden* v. *Golden*, 382 F.3d 348, 359 (3d Cir. 2004) (in situations where a trust is a will substitute and directs the distribution of the decedent's estate upon his death, the probate limitation applies); *Storm* v. *Storm*, 328 F.3d 941, 944-945 (7th Cir. 2003) (same); *cf. Princess Lida of Thurn & Taxis* v. *Thompson*, 305 U.S. 456 (1939) (upholding the exclusive jurisdiction of state courts in resolving matters arising out of a trust when the property of the trust was under the jurisdiction of the state court). The United States' contention (Br. 17-18) that English courts of chancery in 1789 exercised jurisdiction over trusts is irrelevant, since, as discussed below, *see infra* Part I.B.2, the scope of chancery jurisdiction in 1789 is not determinative of the scope of the probate limitation, which turns on whether a federal suit would impermissibly interfere with the operations of the special state-court system for adjudicating probate matters.

in his will and living trust. The Court of Appeals concluded (Pet. App. 30) that petitioner's claim therefore necessarily implicates the validity of J. Howard's testamentary instruments. Both the Court of Appeals and the probate court itself also found (*id.* at 35-36) that under Texas law, such claims can be raised only in the probate court—where petitioner's claim was in fact raised, tried, and decided against her. Under these circumstances, petitioner's claim falls within the probate limitation on federal jurisdiction.

2. Petitioner contends that her suit is an action "*inter partes*," and that this Court has held that *inter partes* actions are not subject to the probate limitation. That argument misapprehends this Court's precedents regarding the probate limitation. Contrary to petitioner's assertion, "disputes between parties that arise out of wills" (Br. 16) are not necessarily within federal jurisdiction. Indeed, many of this Court's decisions invoking the probate limitation involve such disputes; *Sutton*, for example, was a dispute among parties arising out of a clause in a will that plaintiffs alleged was procured by undue influence. *See* 246 U.S. at 202-203.

To be sure, not all *inter partes* disputes related to probate, even suits that seek an adjudication of claims against a decedent's estate, are subject to the probate limitation. Federal courts "have jurisdiction to entertain suits [by] claimants against a decedent's estate . . . *so long as the federal court does not interfere with the probate proceedings.*" *Markham*, 326 U.S. at 494 (emphasis added). As discussed above, however, where an *inter partes* action would interfere with the operations of the state probate court by impinging on that court's exclusive jurisdiction over core matters of probate, federal jurisdiction is barred.

The precise nature of that distinction was made clear in *Sutton*, which summarized this Court's precedents on the probate limitation. *Sutton* explained that, "as the authority to make wills is derived from the states," both "matters of strict probate" and proceedings "incidental or ancillary to the probate," including actions "to set aside a will or the probate thereof," are outside federal jurisdiction. 246 U.S.

at 205. On the other hand, "questions relating to the interests of heirs, devisees, or legatees, . . . which may be determined without interfering with probate or assuming general administration" of an estate may be heard in federal court. *Id.* Moreover, because the concern over interfering with state probate proceedings is not present when a state permits a plaintiff to bring a "suit *inter partes* . . . to annul a will or to set aside the probate" in its courts of general jurisdiction, such a suit is cognizable in federal court. *Id.*

Applying these principles, *Sutton* held that because an *inter partes* action challenging the validity of a portion of a decedent's estate plan on the grounds of undue influence was within the exclusive jurisdiction of the Texas probate courts, it could not be heard in federal court. *See* 246 U.S. at 207-208; *see also Farrell*, 199 U.S. at 110-111 (*inter partes* disputes that may be heard in federal court do not include actions "ancillary" to probate).[3] As respondent explains, petitioner's suit here is the type of *inter partes* action *Sutton* and its progenitors held barred by the probate limitation.[4]

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[3] Contrary to petitioner and her amici, this analysis does not offend the principle that the states cannot dictate the scope of federal jurisdiction. Pet. Br. 42-49; U.S. Br. 12-16. To be sure, a state could not remove a state-law cause of action unrelated to probate from federal diversity jurisdiction simply by placing it within the exclusive jurisdiction of the probate courts. But, in order to determine whether a particular probate-related cause of action is "ancillary" to probate—so that permitting it to proceed in federal court would unduly interfere with state-court probate jurisdiction—*Sutton* and *Farrell* appropriately look to whether the cause of action is within the exclusive jurisdiction of the state probate courts under state law.

[4] Nothing in *Markham* v. *Allen*, the Supreme Court's most recent affirmation of the probate limitation on federal court jurisdiction, is inconsistent with this analysis. *Markham* was a suit brought under the federal Trading with the Enemy Act, which entitled the United States, through an Alien Property Custodian, to seize property of enemy aliens in the United States; the Custodian sought a declaration that, under the Act, he was entitled to seize property bequeathed to German legatees. *See* 326 U.S. at 492. Plaintiff did not challenge, and the case did not involve, the validity of the will, the bequests, or the decedent's testamentary intent. Indeed, in *Markham*, the plaintiff's claim arose under *federal* law that

B. The Probate Limitation Appropriately Construes The Grant Of Jurisdiction To Federal Courts Over State-Law Matters In Light Of Basic Principles Of Federalism And Comity

Like the cognate limitation on federal jurisdiction over domestic relations matters, *see Ankenbrandt* v. *Richards*, 504 U.S. 689 (1992), the probate limitation stems from the recognition that matters of probate are within the special authority and competence of the states, and that Congress's limited grant of power to federal courts to resolve state-law matters should be construed to respect that historical allocation of authority. As *Ankenbrandt* recognized, determining the scope of federal jurisdiction in light of such traditional principles of comity is both sound as a matter of policy and unexceptionable as a matter of statutory interpretation.

1. In *Ankenbrandt*, this Court addressed and reaffirmed the long-standing restriction on federal jurisdiction over divorce, alimony, and child custody matters. From an early date, this Court has recognized that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." *In re Burrus*, 136 U.S. 586, 593-594 (1890); *see also Barber* v. *Barber*, 62 U.S. (21 How.) 582, 584 (1859) ("We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony . . . .").

As *Ankenbrandt* explained, this principle is best understood as a limiting construction of the statutory grant of jurisdiction to federal courts to entertain state-law matters. *See* 504 U.S. at 698-703. In *Ankenbrandt*, the statute at issue was the diversity statute, which originally granted federal courts concurrent jurisdiction with the state courts of

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preempted contrary state law regarding property entitlements. As such, there was no argument that the claim was within the exclusive jurisdiction of a state probate court. Accordingly, the suit in *Markham* could not be said to be outside federal jurisdiction on the ground that it "interfered" with state probate proceedings. *See id.* at 495.

"all suits of a civil nature at common law or in equity" where the diversity and amount-in-controversy requirements were met. *Id.* at 698 (quoting Judiciary Act of Sept. 24, 1789, § 11, 1 Stat. 73, 78). The early domestic relations cases suggest that suits for divorce, alimony, and child custody were not "suits of a civil nature at common law or in equity" within federal jurisdiction, both because the jurisdiction of English courts of chancery over such matters was limited, *see id.* at 699-700, and, more importantly in our federal system, because such matters were traditionally regulated exclusively by the states, which had created specialized procedures for adjudicating them, *see Burrus*, 136 U.S. at 593-594. Indeed, this Court recently explained that the domestic relations limitation recognized in *Ankenbrandt* stems from the "strong . . . deference to state law in this area." *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 12 (2004).[5]

Ankenbrandt concluded that, regardless of the precise historical origins of the domestic relations limitation, it was a well-established construction of Congress's grant of jurisdiction to federal courts over state-law matters. *See* 504 U.S. at

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[5] In *Ankenbrandt*, the majority did not decide the precise historical origin of the domestic relations limitation, although it discussed suggestions in the early domestic relations cases that such matters were outside the scope of English chancery jurisdiction (being handled by ecclesiastical courts). *See* 504 U.S. at 699. Justice Blackmun, concurring in the judgment, expressed the view that "[t]hese cases are premised not upon a concern for the historical limitation of equity jurisdiction of the English courts, but upon the virtually exclusive primacy at that time of the States in the regulation of domestic relations." *Id.* at 714. The two explanations are by no means inconsistent. Ecclesiastical courts, of course, have never been a feature of the American court system; state courts of specialized jurisdiction supplied the remedies that could not be furnished in federal courts of law or equity. Thus, while the original limitations on federal power and jurisdiction over domestic relations matters may have stemmed in part from perceived limitations on the jurisdiction of the English courts of chancery, this Court has recently explained that the continued vitality of those limitations rests on the primacy of the specialized state system that evolved to adjudicate such matters and the reluctance to interfere with the operations of that system. *See Newdow*, 542 U.S. at 12-13.

700-701. Consequently, when in 1948, after the merger of law and equity, Congress amended the diversity statute to encompass "all civil actions" that met the diversity and amount-in-controversy requirements—but took no action to eliminate the domestic relations limitation—it could be deemed to be aware of and to have acquiesced in the time-honored understanding that such civil suits did not include divorce, alimony, or child custody matters. *Id.* (quoting 28 U.S.C. § 1332).[6]

2. The analysis in *Ankenbrandt* applies equally to the probate limitation. Like the domestic relations limitation, the probate limitation is best understood as a limiting construction of the statutory grant of authority to federal courts over civil actions arising under state law in light of the traditional primacy of the states in matters of probate.

As *Harris* observed, "the settlement and distribution of decedents' estates and the right to succeed to the ownership of realty and personalty are peculiarly matters of state law." 317 U.S. at 450; *see also, e.g., Sutton*, 246 U.S. at 205 ("[T]he authority to make wills is derived from the states, and the requirement of probate is but a regulation to make a will effective . . . ."); *Ellis* v. *Davis*, 109 U.S. 485, 497 (1883) ("[O]riginal probate . . . is [a] mere matter of state regulation, and depends entirely upon the local law . . . ."). The construction of the grant of federal jurisdiction over state-law actions to exclude probate matters gives effect to this traditional understanding of the balance of federal-state

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[6] *Ankenbrandt* went on to hold that the precise suit at issue in that case—a tort suit by a woman seeking damages from her ex-husband for alleged physical and sexual abuse of their children—was not barred by the domestic relations limitation. *See* 504 U.S. at 704. That outcome is unsurprising, since the suit did not seek a decree of divorce, alimony, or custody; did not seek to overturn, modify, or enforce such a decree; did not seek to attack a judgment of the family court of the state; and did not seek relief that under state law could be obtained only from the family court. Accordingly, and unlike petitioner's suit here, the action in *Ankenbrandt* in no way interfered with the operations of the special state tribunals designed to handle divorce, alimony, and custody matters.

power and prevents "interfer[ence] with the operations of state tribunals invested with [probate] jurisdiction." *Harris*, 317 U.S. at 450; *see also Markham*, 326 U.S. at 494.

Like the domestic relations cases, some of the cases addressing the probate limitation invoke English practice—specifically, the exclusive ecclesiastical jurisdiction over certain probate matters—to support their construction of "suits of a civil nature at common law or in equity" as excluding probate and disputes inextricably connected to probate. *See, e.g., Markham*, 326 U.S. at 494. As with the domestic relations cases, however, the historical limitations on ecclesiastical jurisdiction cannot entirely explain the origins or the scope of the probate limitation. *See, e.g., Dragan* v. *Miller*, 679 F.2d 712, 713 (7th Cir. 1982) (Posner, J.) (discussing the "dubious . . . historical pedigree" of the explanation premised on English ecclesiastical jurisdiction). To take one example, ecclesiastical courts apparently did not have exclusive jurisdiction over wills devising real estate, *see id.*; but the probate limitation on federal jurisdiction in this country has always encompassed wills of realty as well as wills of personalty.[7] As with the domestic relations limitation, the continued vitality of the probate limitation stems in large part from respect for, and desire to avoid interference with, the states' and the specialized state probate courts' primary authority over probate matters. *See Harris*, 317 U.S. at 450.

In any event, as *Ankenbrandt* made clear, regardless of the original justification for the probate exception, its long acceptance by this Court and the lower federal courts strongly counsels in favor of its continued recognition today. *See* 504 U.S. at 700-701. For over one hundred fifty years, federal jurisdiction has been construed to exclude probate matters. The probate limitation is thus a long-standing and

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[7] *See, e.g., Ellis*, 109 U.S. at 495 (explaining that allocation of probate jurisdiction in this country differed from that in England in that "probate jurisdiction was extended . . . over wills of land"); *Sutton*, 246 U.S. 199 (applying probate limitation to dispute arising out of will disposing of real estate); *Broderick's Will*, 88 U.S. (21 Wall.) 503 (same).

robust feature of the legal landscape against which Congress acted, not only when it reenacted the diversity statute in 1948, but also when it enacted the current statutory grant of bankruptcy jurisdiction in 1978, *see infra* Part II. Because there is no indication in either statute that Congress intended to depart from that settled understanding regarding the scope of federal court power to resolve state-law disputes, it must be deemed to have acquiesced in it.

3. The long-standing recognition of a limitation on federal jurisdiction over probate matters is consistent with established principles of statutory interpretation and reflects proper deference to principles of federalism.

This Court has consistently recognized that the existence of an established, comprehensive state regulatory scheme—such as state regulation of probate—counsels against interpreting a grant of federal power to permit interference with that scheme. *See Gonzales* v. *Oregon*, 2006 WL 89200, at *18 (U.S. Jan. 17, 2006) (refusing to construe the Controlled Substances Act in a way that would "effectively displace[] the States' general regulation of medical practice"). Indeed, it is a firmly settled principle of statutory interpretation that federal statutes should be construed to respect the states' place as "independent sovereigns in our federal system," and not to trammel on traditional state prerogatives unless it is clear that Congress so intended. *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485 (1996). "Federal statutes impinging upon important state interests 'cannot ... be construed without regard to the implications of our dual system of government,'" and "where the intent to override [state law] is doubtful, our federal system demands deference to long-established traditions of state regulation." *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531, 544, 546 (1994) (holding that meaning of term "reasonably equivalent value" in Bankruptcy Code depends on state law) (citation omitted). "[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state bal-

ance" by making law in an area historically reserved to the States. *United States* v. *Bass*, 404 U.S. 336, 349 (1971).[8]

These same principles inform the interpretation of jurisdictional statutes, which—like other federal statutes—must be read against the backdrop of "'our dual system of government,'" *BFP*, 511 U.S. at 544 (citation omitted). As this Court has observed: "'If the history of the interpretation of judiciary legislation teaches us anything, it teaches the duty to reject treating such statutes as a wooden set of self-sufficient words . . . .'" *Merrell Dow Pharms. Inc.* v. *Thompson*, 478 U.S. 804, 810 (1986) (citation omitted). Rather, "in exploring the outer reaches" of statutes conferring federal jurisdiction, "sensitive judgments" must be made "about congressional intent, judicial power, and the federal system." *Id.* In *Merrell Dow*, the Court accordingly construed the federal-question statute narrowly to exclude suits that turn on the interpretation of a federal statute where the cause of action is one "traditionally relegated to state law," *id.* at 811, and there is no private right of action to enforce the federal statute—a class of cases that the federal courts have little interest in adjudicating. *See id.* at 811-812; *see also Franchise Tax Bd.* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 21-22 & n.22 (1983) (relying in part on "considerations of comity" to find no federal-question jurisdiction over a suit by a state for a declaration of the validity of state law, and explaining that such a suit "is suffi-

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[8] *See also, e.g., Solid Waste Agency of N. Cook County* v. *United States Army Corps of Eng'rs*, 531 U.S. 159, 173 (2001) (refusing to adopt construction of federal statute that would "alter[] the federal-state framework by permitting federal encroachment upon a traditional state power"); *Pegram* v. *Herdrich*, 530 U.S. 211, 237 (2000) (in a field that is "a subject of traditional state regulation, there is no . . . preemption without clear manifestation of congressional purpose"); *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (where "Congress [has] legislated . . . in [a] field which the States have traditionally occupied . . . we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress" (citations omitted)).

ciently removed from the spirit of necessity and careful limitation of district court jurisdiction . . . to convince us that, until Congress informs us otherwise, such a suit is not within" federal jurisdiction); *Shamrock Oil & Gas Corp.* v. *Sheets*, 313 U.S. 100, 108-109 (1941) (construing removal statute narrowly because of comity concerns). Thus, comity concerns properly inform even the interpretation of the scope of federal-question jurisdiction; they necessarily have yet more force in the interpretation of the grants of jurisdiction to federal courts over purely state-law matters. Given the long-standing reservation to the states of power over the regulation of probate, the grant of jurisdiction to federal courts should not be construed to permit interference with that traditional state authority, absent some clear indication Congress intended that result.

"[T]he dictates of sound judicial policy," *Merrell Dow*, 478 U.S. at 810, also support the conclusion that Congress did not intend to grant federal courts jurisdiction over actions that would interfere with state probate proceedings. *Cf. Ankenbrandt*, 504 U.S. at 703-704 (considering the policy reasons for the domestic relations limitation). As this Court has recognized, the nature of probate—a proceeding that must often adjudicate multiple parties' conflicting claims to a single *res*—requires that there be one efficient, final, and authoritative action to determine title to the property of a decedent. *See Broderick's Will*, 88 U.S. (21 Wall.) at 509 (transferring property from a decedent to an heir or legatee requires a "convenient jurisdiction and mode of proceeding by which this devolution may be effected with least chance of injustice and fraud; and that the result obtained should be firm and perpetual"). Both legal certainty and efficiency are undermined if an issue can be litigated in both the state probate court and the federal court. *See Dragan*, 679 F.2d at 714 (the resolution of the validity of the testamentary instrument is "less certain, less predictable, than if it can be litigated in one or the other forum only, even if the same substantive law is applied").

Because probate proceedings must be commenced in the state probate court, judicial economy and judicial specialization also support keeping matters related to these proceedings in the state probate courts. *See Dragan*, 679 F.2d at 714. The state probate courts are experts in probate law, particularly where a state has established separate probate courts with exclusive jurisdiction over probate-related matters; conversely, federal courts will have only limited experience in adjudicating issues that are uniquely tied to the probate of wills, such as undue influence or testamentary capacity. *See id.* at 715. These considerations further support interpreting the federal statutory grant of jurisdiction to respect the traditional allocation of power over such matters, absent some evidence Congress intended otherwise.

II. THE PROBATE LIMITATION APPLIES EQUALLY TO DISTRICT AND BANKRUPTCY COURTS EXERCISING "RELATED TO" BANKRUPTCY JURISDICTION

Petitioner and her amici contend that any probate limitation on diversity jurisdiction cannot apply in bankruptcy because bankruptcy is a creature of federal law. That formulation fails to recognize that the question here is the authority of a court sitting in bankruptcy to entertain disputes, like this one, that arise solely under state law. As demonstrated in Part I, the limitations on federal jurisdiction over state-law probate matters were well-established by 1978, when the current bankruptcy jurisdiction statute was enacted, and nothing in either the text or the legislative history of the bankruptcy jurisdiction statute demonstrates any intent by Congress to depart from that accepted understanding. Nor is there any textual, historical, or policy ground to treat bankruptcy jurisdiction over state-law probate matters any differently from diversity jurisdiction over such matters.[9]

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[9] Amici contend (Aaron Br. 25-26) that respondent waived his right to challenge the bankruptcy court's subject-matter jurisdiction over petitioner's claim against him because he filed a proof of claim in her bank-

A. The Statutory Grant Of Jurisdiction

The current grant of jurisdiction to the federal district courts over bankruptcy matters was adopted in substantially its present form in the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, and is now codified at 28 U.S.C. § 1334.[10] Section 1334(a) grants the district courts "original and exclusive jurisdiction of all cases under title

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ruptcy case and she then counterclaimed against him. But one of the most basic legal principles is that subject-matter jurisdiction is not waivable. As this Court has stated, "It needs no citation of authorities to show that the mere consent of parties cannot confer upon a court of the United States the jurisdiction to hear and decide a case." *People's Bank* v. *Calhoun*, 102 U.S. 256, 260-261 (1880); *accord, e.g., American Fire & Cas. Co.* v. *Finn*, 341 U.S. 6, 18 n.17 (1951). Amici's authorities are not to the contrary. *Langenkamp* v. *Culp* held that a proof of claim could in certain circumstances constitute a waiver of the claimant's right to a jury trial on a counterclaim. *See* 498 U.S. 42, 44-45 (1990). Similarly, *Arecibo Cmty. Health Care, Inc.* v. *Commonwealth of Puerto Rico* held that section 106 of the Bankruptcy Code, 11 U.S.C. § 106(b), constitutionally provided that the filing of a proof of claim by a governmental unit waived any claim to sovereign immunity from compulsory counterclaims asserted by the debtor. *See* 270 F.3d 17, 20 (1st Cir. 2001). Both the right to a jury trial and sovereign immunity are waivable; a challenge to subject-matter jurisdiction is not. Nor does *Commodity Futures Trading Comm'n* v. *Schor* help amici's argument; to the contrary, that case reaffirmed the proposition that "the parties by consent cannot confer on federal courts subject-matter jurisdiction" they do not possess. 478 U.S. 833, 851 (1986).

[10] The 1978 Act provided that bankruptcy courts could exercise all of the jurisdiction granted to the district courts. *See* 28 U.S.C. § 1471(c) (repealed 1984). In *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982), this Court held that such a sweeping grant of judicial power to the non-Article III bankruptcy courts violated the Constitution, at least insofar as it permitted bankruptcy courts to adjudicate state common-law contract and tort actions. In response to *Marathon*, the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, amended the provisions of the 1978 Act that concerned the allocation of authority between the district courts and the bankruptcy courts to ensure that, absent parties' consent, bankruptcy courts would not enter final judgments in matters constitutionally required to be adjudicated by an Article III tribunal. *See* 28 U.S.C. § 157. The 1984 amendments did not, however, purport to alter the basic scope of the 1978 jurisdictional grant to the district courts.

11." 28 U.S.C. § 1334(a). In addition, section 1334(e) grants the district court in which a bankruptcy case is pending exclusive *in rem* jurisdiction over "all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate." *Id.* § 1334(e)(1). Finally, section 1334(b) grants the district courts "original *but not exclusive* jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." *Id.* § 1334(b) (emphasis added).

Thus, section 1334(a) provides that bankruptcy cases may be brought only in the federal district courts, *see, e.g.*, *In re Wood*, 825 F.2d 90, 92 (5th Cir. 1987) (section 1334(a) "refers merely to the bankruptcy petition itself"), and section 1334(e) grants the particular district court in which the bankruptcy case is filed exclusive *in rem* jurisdiction over property of the estate.

Because a bankruptcy "case" is merely an umbrella under which the various "proceedings" that comprise the case are assembled, however, the most significant jurisdictional provision is section 1334(b), which grants the district courts non-exclusive jurisdiction over all of the "proceedings" that comprise the bankruptcy case. Section 1334(b) identifies three distinct types of "proceedings" over which the district courts possess non-exclusive jurisdiction: (1) proceedings "arising under title 11"; (2) proceedings "arising in . . . cases under title 11"; and (3) proceedings "related to cases under title 11."

Proceedings "arising under title 11" are those in which the cause of action is created by the Bankruptcy Code, such as, for example, a complaint to avoid a preferential transfer, *see* 11 U.S.C. § 547, or a motion to reject an executory contract, *see id.* § 365. *See Wood*, 825 F.2d at 96 ("Congress used the phrase 'arising under title 11' to describe those proceedings that involve a cause of action created or determined by a statutory provision of title 11."); 1 *Collier on Bankruptcy* ¶ 3.01[4][c][i] (15th ed. rev. 2005). Proceedings "arising in . . . cases under title 11," by contrast, are matters that do not originate in an express right or cause of action

under the Bankruptcy Code, but nevertheless can arise only in a bankruptcy case, such as, for example, a proceeding to determine the validity of a claim against the estate, *see* 11 U.S.C. § 502. *See Wood*, 825 F.2d at 97 ("'[A]rising in' proceedings are those that are not based on any right expressly created by title 11, but . . . would have no existence outside of the bankruptcy."); 1 *Collier on Bankruptcy* ¶ 3.01[4][c][iv].

Both proceedings "arising under title 11" and proceedings "arising in . . . cases under title 11" arise under federal law because they owe their existence to the federal bankruptcy scheme. But the last category of proceedings under section 1334(b)—proceedings that are merely "related to cases under title 11"—is quite different. Under the ambit of the "related to" provision, federal courts may hear a variety of disputes that exist independently of the bankruptcy case, that arise solely under state law, and that, absent a bankruptcy, could be heard only in state court—as long as the resolution of the dispute could affect the bankruptcy estate. *See, e.g., Celotex Corp.* v. *Edwards*, 514 U.S. 300, 307-308 (1995); *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 54 (1982) (plurality) (the "related to" provision "empowers bankruptcy courts to entertain a wide variety of cases involving claims that may affect the property of the estate," including "claims based on state law"); *Pacor, Inc.* v. *Higgins*, 743 F.2d 984, 994-995 (3d Cir. 1984).[11]

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[11] As amended by the 1984 Bankruptcy Amendments and Federal Judgeship Act, section 1334 grants jurisdiction over bankruptcy cases and proceedings in the first instance only to the district courts. Section 157, however, permits the district courts to refer "any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 . . . to the bankruptcy judges for the district." 28 U.S.C. § 157(a). In accordance with *Marathon*'s dictates, bankruptcy judges to whom such matters are referred "may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11." *Id.* § 157(b)(1). "Core proceedings" include a variety of enumerated matters, *id.* § 157(b)(2), but must arise either under the Bankruptcy Code or in a bankruptcy case, *see Wood*, 825 F.2d at 97 ("[A] proceeding is core under section 157 if it invokes a substantive right

B. This Case Turns On The Scope Of Section 1334(b)'s Grant Of "Related To" Jurisdiction

Of the various jurisdictional provisions of section 1334, only one is relevant to this case: section 1334(b)'s grant of non-exclusive jurisdiction over "all civil proceedings . . . related to cases under title 11." Petitioner's claim to J. Howard's assets plainly does not arise under title 11; her cause of action arises under Texas law, not the Bankruptcy Code. Nor does her claim arise in a case under title 11; it could—and did—exist independently of her bankruptcy case. Rather, a claim like petitioner's—a state-law claim by the debtor against a third party—is at best a claim "related to" the bankruptcy case. *See Celotex*, 514 U.S. at 307 n.5 ("Proceedings 'related to' the bankruptcy include . . . causes of action owned by the debtor which become property of the estate . . . ."); *Marathon*, 458 U.S. at 72 n.26.

Petitioner and her amici go seriously astray in contending that section 1334(e) gives the district court exclusive jurisdiction over petitioner's claim. Pet. Br. 30, 33-34; Aaron Br. 7-8, 17-20. Section 1334(e) does not confer jurisdiction to hear and decide *in personam* actions; it merely grants the district court *in rem* jurisdiction over the property of the bankruptcy estate. Although petitioner's state-law cause of action is property of the estate, *see* 11 U.S.C. § 541, it does not follow that section 1334(e) confers exclusive jurisdiction to *adjudicate* that cause of action.

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provided by title 11 or if it is a proceeding that, by its nature, could arise only in the context of a bankruptcy case."). Those categories of proceedings correspond to the matters of "public right" that are "at the core of the federal bankruptcy power" and thus, under *Marathon*, may constitutionally be adjudicated by a non-Article III tribunal. 458 U.S. at 71 (plurality). By contrast, "non-core" proceedings, which include state-law matters that are merely "related to" the bankruptcy case, may not constitutionally be remitted to a non-Article III tribunal for resolution, *see id.*; such matters may be heard by the bankruptcy court but not determined by that court absent the consent of all the parties, *see* 28 U.S.C. § 157(c). As to such non-core matters, the bankruptcy court acts as a magistrate, making proposed findings and conclusions that are then reviewed *de novo* by the district court. *See id.*; Fed. R. Bankr. P. 9033.

Petitioner and her amici's contrary reading creates numerous inconsistencies and absurdities. *First*, petitioner's reading of section 1334(e) would make that provision conflict with section 1334(b), which provides that district courts have concurrent, not exclusive, jurisdiction over state-law claims by the debtor "related to" the bankruptcy.[12] *Second*, because the jurisdiction granted by section 1334(e) is *exclusive*, petitioner's reading of the statute would mean that trustees and debtors-in-possession would be unable to pursue claims belonging to the estate in state court, or in any court other than the district court where the bankruptcy is pending. Such claims, however, are routinely brought in other courts—indeed, that is expressly contemplated by the bankruptcy venue provisions. *See, e.g.*, 28 U.S.C. § 1409(b) (requiring trustee to bring certain actions against third parties "only in the district court for the district in which the defendant resides"). *Third*, petitioner's reading of section 1334(e) cannot be reconciled with the abstention and remand provisions, which provide that district courts may, in certain circumstances, abstain from adjudicating state-law "related to" actions, *see id.* § 1334(c), and may remand such actions to state court if removed from state court, *see id.* § 1452(b). If the district court's jurisdiction over such claims were exclusive, there would be no room for abstention or remand.[13]

In short, section 1334(e) is irrelevant to this case; if the district court did have jurisdiction to adjudicate petitioner's

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[12] Amici's contention (Aaron Br. 7-8) that the district court had jurisdiction over petitioner's claim under *both* section 1334(e) and 1334(b) is nonsensical; a court cannot simultaneously have exclusive and non-exclusive jurisdiction over a claim.

[13] Amici argue (Aaron Br. 16) that a court sitting in bankruptcy can abstain under section 1334(c) from exercising its exclusive jurisdiction under section 1334(e). Again, this contention makes no sense: if the district court in which the bankruptcy is pending has exclusive jurisdiction of a matter, no state court could have jurisdiction of that matter, and thus there could never be any state-court proceeding in favor of which the district court could abstain. The notion of abstention from the exercise of exclusive jurisdiction is meaningless.

claim, it could only be pursuant to the grant of "related to" jurisdiction under section 1334(b).

C. Nothing In The Language Or Legislative History Of Section 1334(b)'s Grant Of "Related To" Jurisdiction Suggests That Congress Intended To Abrogate The Well-Established Limitation On Federal Jurisdiction Over State-Law Probate Matters

Petitioner and her amici wrongly contend that, because section 1334 does not expressly refer to the long-established and often reiterated limitation on federal courts' jurisdiction over state-law probate matters, it must be construed as having abrogated that limitation. As this Court explained in *Ankenbrandt*, that reasoning is backward. Federal jurisdiction over causes of action arising entirely under state law is, by its very nature, limited. And because federal jurisdiction over state-law matters has, since the early nineteenth century, been construed to exclude claims that would interfere with state-court probate proceedings, section 1334's grant of jurisdiction over state-law claims related to the bankruptcy should be interpreted consistently with that principle, absent some indication of an intent to depart from it. *Cf. Ankenbrandt*, 504 U.S. at 699-703; *see supra* Part I.B.

Section 1334(b) contains no such indication. Indeed, the relevant language of section 1334(b), granting jurisdiction over "all civil proceedings" related to the bankruptcy case, is substantially similar to the language of the diversity statute, which prior to 1948 conferred jurisdiction over "all suits of a civil nature at common law or in equity," and after 1948 over "all civil actions," that met the diversity and amount in controversy requirements. *See* 28 U.S.C. § 1332(a); *Ankenbrandt*, 504 U.S. at 700. Just as the term "civil actions" in the diversity statute, while granting jurisdiction over a broad range of state-law matters that meet the statutory requirements, excludes certain domestic relations and probate matters traditionally considered to be the exclusive

prerogative of the state courts, so too does the term "civil proceedings" in section 1334(b).[14]

Moreover, prior to 1978, this Court recognized that it is appropriate to construe the scope of the powers conferred by the bankruptcy statute in light of the established limitation on federal court jurisdiction over state-law probate matters. *See Harris*, 317 U.S. 447. The question in *Harris* was whether the administrator of the estate of a deceased debtor could petition to revive bankruptcy proceedings that had been abated by the debtor's death, as the 1898 Bankruptcy Act provided, when the state court administering the decedent's estate refused to permit the petition. *See id.* at 449-450. This Court held that the administrator was bound by the state court's decision, explaining:

> When we reflect that the settlement and distribution of decedents' estates and the right to succeed to the ownership of realty and personalty are peculiarly matters of state law; that the federal courts have no probate jurisdiction and have sedulously refrained, even in diversity cases, from interfering with the operations of state tribunals invested with that jurisdiction, we naturally incline to a construction of [the Bankruptcy Act] consistent with these principles.

Id. at 450. There is no reason to believe that, in the 1978 Act, Congress intended silently to abrogate the principles that the *Harris* Court regarded as so firmly established.

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[14] Section 1334(b) uses the term "proceedings," rather than "actions," because many proceedings in a bankruptcy case are not full-fledged civil actions initiated by a complaint, but rather contested matters initiated by motion. *Compare* Fed. R. Bankr. P. 7001, 7003 (requiring certain matters to be litigated as adversary proceedings initiated by complaint) *with* Fed. R. Bankr. P. 9014 (governing contested matters); *see also* Fed. R. Bankr. P. 9002(1) (defining "civil action" in federal rules of civil procedure made applicable to bankruptcy cases as "an adversary proceeding or . . . contested matter"). That *procedural* distinction between "actions" and "proceedings," however, has no bearing on the *substantive* limitation on federal jurisdiction over probate matters.

See, e.g., *Midlantic Nat'l Bank* v. *New Jersey Dep't of Envt'l Prot.*, 474 U.S. 494, 501 (1986) (in interpreting the Bankruptcy Code, applying the principle that "if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific").

There is also no evidence in the legislative history of the 1978 Act that Congress intended to grant courts sitting in bankruptcy the authority to adjudicate probate matters merely because they might have an effect on the bankruptcy estate. Indeed, the legislative history is to the contrary. Prior to adoption of the 1978 Act, the Commission on the Bankruptcy Laws of the United States considered the question whether Congress should provide for administration of insolvent decedents' estates by the bankruptcy courts. Recognizing that the 1898 Act had been consistently interpreted not to permit such interference with state court probate, and in light of "the tradition of federal deference to state control of administration of decedents' estates," the Commission recommended against altering this established feature of the bankruptcy laws, and Congress did not do so. Report of the Commission on the Bankruptcy Laws of the United States, H.R Doc. 93-137, at 184-185 (1973).[15]

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[15] Petitioner relies heavily on statements in the legislative history that a debtor's death does not automatically abate a bankruptcy case, contending that this means that Congress intended to confer broad-ranging jurisdiction over probate matters. Pet. Br. 35-36. But this special provision for winding up the bankruptcy estates of debtors who die after commencement of the bankruptcy case is wholly consistent with the probate limitation. As the legislative history cited by petitioner itself explains, "[O]nce the [bankruptcy] estate is created, no interests in property of the estate remain in the debtor." H.R. Rep. No. 95-595, at 368, *reprinted* in 1978 U.S.C.C.A.N. at 6324 (quoted at Pet. Br. 35). A bankruptcy is thus unaffected by the debtor's death for a very simple reason: the bankruptcy estate's assets no longer belong to the debtor and thus cannot become a part of any probate proceeding. Accordingly, the continuation of the bankruptcy cannot interfere with the state-court probate proceedings, and the probate limitation is not implicated. It does not follow, however, that a debtor's death gives the bankruptcy court jurisdiction to probate the deceased debtor's will and adjudicate claims to the debtor's exempt

In short, petitioner and her amici cannot point to any specific indicia of congressional intent to grant jurisdiction over probate matters that would defeat the presumption that Congress intended to respect that long-standing limitation. Rather, they are forced to fall back on general statements in the legislative history to the effect that the 1978 Act was intended to expand bankruptcy court jurisdiction. Pet. Br. 31-33; Aaron Br. 11. While that is true, it is irrelevant to the question here. The 1978 Act was intended to reform the 1898 Act's antiquated "referee" system, under which bankruptcy courts' jurisdiction was restricted to "summary" proceedings regarding property under the control of the court, and absent consent did not extend to "plenary" proceedings, such as actions to recover estate property in the hands of a third party. *See Marathon*, 458 U.S. at 53 (plurality). The 1978 Act eliminated that distinction and permitted district and bankruptcy courts to adjudicate *in personam* actions related to the bankruptcy case. *See id.* at 54. But that says nothing about whether the "related to" jurisdiction encompasses probate matters that, prior to 1978, were never thought to come within the jurisdiction of the federal courts. As demonstrated above, there is no textual or historical evidence that Congress intended to alter that settled limitation on federal jurisdiction.

D. The Justifications For The Probate Limitation In Diversity Actions Are Equally Powerful In "Related To" Actions Heard In Bankruptcy Court

Petitioner and her amici contend that the probate limitation is relevant only to diversity cases, and that because bankruptcy is a matter arising under federal law, the probate limitation is inapplicable. Indeed, petitioner frames one of her questions presented as whether "Congress intend[ed] the probate exception to apply to cases arising under the Constitution, laws, or treaties of the United States[,] . . . in-

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property—still less that the bankruptcy court may adjudicate claims by debtors contesting the estate plan of a non-debtor decedent.

cluding the Bankruptcy Code." Pet. Br. i. Petitioner fails to recognize that, as demonstrated above, what is at issue here is not the scope of the federal courts' authority to adjudicate claims arising under the Bankruptcy Code, but rather the scope of their authority to adjudicate state-law claims that are "related to" the bankruptcy case. Because both the diversity statute and "related to" jurisdiction permit federal courts to adjudicate a limited set of matters that arise solely under state law, construing the two statutes to encompass probate matters raises essentially identical concerns, and the two statutes must be interpreted consistently.

Like diversity jurisdiction, *see* 28 U.S.C. § 1332, and like supplemental jurisdiction over state-law claims in federal question cases, *see id.* § 1367, "related to" jurisdiction permits a federal court to adjudicate state-law claims in certain specific circumstances where policy considerations trump concerns over comity and deference to state courts' expertise in state law. In diversity cases, the relevant policy concern is the fear that out-of-state litigants will face discrimination in their opponents' home-state courts. *See, e.g., Barrow S.S. Co.* v. *Kane*, 170 U.S. 100, 111 (1898) ("The object [of the diversity statute] was to secure a tribunal presumed to be more impartial than a court of the state in which one of the litigants resides."); *Bank of the United States* v. *Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809). In the case of supplemental jurisdiction, the primary relevant concern is judicial economy: once the parties are in federal court to adjudicate their federal claims, efficiency may warrant adjudicating state-law claims arising out of the same facts as well. *See United Mine Workers of Am.* v. *Gibbs*, 383 U.S. 715, 726 (1966) (noting that the justification for pendent jurisdiction "lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims").

"Related to" jurisdiction is similar in that concerns for efficiency and ease of administration of the bankruptcy estate may warrant adjudication of pure state-law claims that could affect the estate by the court with jurisdiction over the

bankruptcy case, despite the state courts' greater expertise in, and arguably greater interest in adjudicating, such matters. *See, e.g., Celotex*, 514 U.S. at 308 ("related to" jurisdiction was intended to permit the bankruptcy courts to "'deal efficiently and expeditiously with all matters connected with the bankruptcy estate'") (quoting *Pacor*, 743 F.2d at 994).

"Related to" jurisdiction over state-law matters, as the courts of appeals have understood it, is elastic and potentially expansive. Under the test applied by most courts of appeals, a proceeding is "related to" the bankruptcy case if "the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy." *Pacor*, 743 F.2d at 994. That is, "[a]n action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and . . . in any way impacts upon the handling and administration of the bankrupt estate." *Id.*[16] The "related to" provision thus can bring within the bankruptcy court's ambit matters that raise only questions of state law and that touch only remotely on the central concerns of the bankruptcy. As the *Collier* treatise—which first originated the formulation adopted in *Pacor*—commented when the 1978 Act was adopted, "Conceptually, there is no limit to the

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[16] Most of the courts of appeals have followed *Pacor*'s influential articulation of the standard for "related to" jurisdiction. *See In re Boston Reg'l Med. Ctr., Inc.*, 410 F.3d 100, 105 (1st Cir. 2005); *A.H. Robins Co.* v. *Piccinin*, 788 F.2d 994, 1002 n.11 (4th Cir. 1986); *In re Wood*, 825 F.2d 90, 93 & n.15 (5th Cir. 1987); *In re Time Constr., Inc.*, 43 F.3d 1041, 1045 (6th Cir. 1995); *Integrated Health Servs. of Cliff Manor, Inc.* v. *THCI Co.*, 417 F.3d 953, 957-958 (8th Cir. 2005); *In re Pegasus Gold Corp.*, 394 F.3d 1189, 1193 (9th Cir. 2005); *In re Gardner*, 913 F.2d 1515, 1518 (10th Cir. 1990); *In re Toledo*, 170 F.3d 1340, 1346 (11th Cir. 1999). A minority of circuits have adopted a somewhat different standard. *See In re Cuyahoga Equip. Corp.*, 980 F.2d 110, 114 (2d Cir. 1992); *In re FedPak Sys., Inc.*, 80 F.3d 207, 213-214 (7th Cir. 1996). Although this Court has endorsed *Pacor*'s statement that "related to" jurisdiction extends beyond proceedings involving property of the debtor or the estate—as well as its caveat that "related to" jurisdiction cannot be limitless—it has not adopted a specific test for "related to" jurisdiction. *See Celotex*, 514 U.S. at 308 & n.6.

reach of this jurisdiction." 1 *Collier on Bankruptcy* ¶ 3.01 (15th ed. 1980); *see Pacor*, 743 F.2d at 994 (citing *Collier*).

Because the bankruptcy court is acting at the outer limits of its authority when it is exercising "related to" jurisdiction, that grant of jurisdiction inherently carries with it a risk that bankruptcy courts will improperly decide issues that, in our federal system, ought to be left to state courts to resolve. *See, e.g., Home Ins. Co.* v. *Cooper & Cooper, Ltd.*, 889 F.2d 746, 749 (7th Cir. 1989) (Easterbrook, J.) (noting that a broad construction of "related to" jurisdiction could undesirably impair "the jurisdiction of state courts over questions of state law involving persons not party to the bankruptcy"); *see also supra* Part I.B.3 (discussing cases making clear that federal grants of jurisdiction should be construed in light of federalism and comity concerns).[17]

Accordingly, as Judge Easterbrook noted, in construing the conceptually limitless grant of "related to" jurisdiction, it is appropriate to take into account the general reluctance to oust state courts of jurisdiction over purely state-law matters, absent a compelling reason to do so. That reluctance should be even more powerful in the case of probate matters, given the long-standing recognition that "the settlement and distribution of decedents' estates and the right to succeed to the ownership of realty and personalty are peculiarly matters of state law." *Harris*, 317 U.S. at 450.

That conclusion is reinforced by the absurdities that would result if petitioner's proposed distinction between diversity jurisdiction and "related to" jurisdiction were adopted. Under petitioner's construction of the statute, bankruptcy courts could not only adjudicate claims that would interfere with state probate proceedings, but could

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[17] The grant of bankruptcy jurisdiction, like other federal statutes, is properly construed in light of federalism concerns. *See, e.g., Palmer* v. *Massachusetts*, 308 U.S. 79, 85 (1939) (construing bankruptcy jurisdiction over railroads narrowly to avoid impairing the "old and familiar power of the states" over local railroad services); *BFP*, 511 U.S. at 544 (construing Bankruptcy Code not to impair states' traditional regulatory authority).

actually probate wills and, indeed, could grant divorces—since there is no logical basis for drawing any distinction between probate and domestic relations matters in this regard. It is absurd to think Congress intended to grant bankruptcy courts this sweeping authority possessed by no other federal courts, in the face of more than a century's consistent practice of excluding such matters from federal jurisdiction.

E. The Bankruptcy Abstention Provisions Do Not Implicitly Override The Limitation On "Related To" Jurisdiction Over Probate Matters

Finally, petitioner and her amici are wrong to contend that section 1334's abstention provisions resolve the applicable federalism concerns and demonstrate a congressional intent to abrogate the probate limitation in bankruptcy. Pet. Br. 37-39; U.S. Br. 28-29; Aaron Br. 13-17. The abstention provisions would not prevent bankruptcy courts from probating wills or granting divorces—authority that there is no reason to believe Congress intended to grant them.

Section 1334(c) provides for two types of abstention. *First*, section 1334(c)(1) provides for permissive abstention in "proceedings arising under title 11 or arising in or related to a case under title 11," and provides that nothing in section 1334 "prevents a district court . . . in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding." A district court's decision to abstain or not to abstain under section 1334(c)(1) is "not reviewable by appeal or otherwise." *Id.* § 1334(d).

Second, section 1334(c)(2) provides for mandatory abstention in a much more limited set of circumstances. Mandatory abstention applies only in proceedings "related to a case under title 11," if (1) the proceeding is based upon a state-law claim or a state-law cause of action; (2) the action could not have been commenced in a federal court absent jurisdiction under section 1334; (3) there is a pending state-court action capable of timely adjudication; and (4) a party makes a timely motion for abstention. A district court's decision regarding mandatory abstention is appealable only if the court declines to abstain. *See id.* § 1334(d).

Nothing in the abstention provisions suggests that Congress intended them to replace long-established limitations on federal jurisdiction over probate. Permissive abstention clearly was not intended to substitute for the probate limitation. It is a purely discretionary doctrine, expressly immunized from appellate review. The notion that Congress intended to leave the decision whether a bankruptcy court could probate a will—or grant a divorce—entirely up to that court's unreviewable discretion is simply untenable.

Nor is there reason to believe that Congress intended mandatory abstention under section 1334(c)(2) to substitute for the probate limitation. Section 1334(c)(2) applies only where a state proceeding has been commenced, and can be timely adjudicated, in the state court. Where there is no pending proceeding, however—either because the state probate proceeding has not been commenced or because it has concluded—nothing in the mandatory abstention provision would prevent a bankruptcy court from probating a decedent's will or granting a divorce.

For one hundred fifty years, the probate limitation has been understood to be a jurisdictional limitation. There are no grounds now for transforming it into a discretionary abstention doctrine. Indeed, in *Ankenbrandt* this Court expressly rejected that notion with respect to domestic relations matters, explaining that there was "no principled reason why we should retroactively concoct an abstention doctrine out of whole cloth to account for federal court practice in existence for 82 years prior to the announcement of the first abstention doctrine." 504 U.S. at 706 n.8. The Court should reach the same result here.

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

VICKI LYNN MARSHALL,

Petitioner,

v.

E. PIERCE MARSHALL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF BONNIE SNAVELY AS *AMICA CURIAE* IN SUPPORT OF THE RESPONDENT AND AFFIRMANCE

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INTEREST OF *AMICA CURIAE*[1]

Amica Bonnie Snavely opposes the efforts of the Petitioner, Vicki Marshall, to persuade this Court to adopt a radically new and narrow interpretation of the probate exception. Such a narrow reading of the exception would be inconsistent with this Court's precedents and would guarantee the continuation of the kind of collisions between state and federal courts exemplified by *Marshall* v. *Marshall*. Unfortunately, the *Marshall* case is not an aberration that this Court can safely ignore. Ms. Snavely was a party to litigation that resulted in the same kind of destructive tug-of-war between the state and federal courts, including injunctions issued by a federal court against a state court proceeding, the relitigation in federal court of state-law issues fully heard and decided by a state court, and conflicting decisions by competing courts on the same issues. Ms. Snavely has filed a petition for certiorari in her case, which this Court considered on October 3, 2005 and has held, presumably pending the outcome of this case. See Order List, October 3, 2005, 546 U.S. __ (2005), *available at* http://www.supremecourtus.gov/orders/courtorders/100305pzor.pdf). Because of her pending case, Ms. Snavely is vitally concerned with the outcome of this case.

The fact that this Court received two petitions, practically simultaneously, that present the same story of state courts being subjected to the indignity of federal interference and of judicial gamesmanship by litigants running into federal court to relitigate essentially final determinations by state court judges illustrates precisely the evils that the probate exception was meant to cure. This Court has long acknowledged that the disposition of assets upon death is a matter of unique

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[1] No person or entity other than Bonnie Snavely made a monetary contribution to the preparation or submission of this brief. Counsel of record for both parties have consented to the filing of this brief *amica curiae*, and the letters of consent have been filed with the Clerk.

concern and expertise for the state courts. See *Harris* v. *Zion Savings Bank & Trust Co.*, 317 U.S. 447 (1943). Only by reaffirming the robust conception of the exception adopted by the Ninth Circuit and urged by the Respondent in this case can the Court protect state judiciaries from the offensive and wasteful interference of federal courts. See *Marshall* v. *Marshall (In re Marshall)*, 392 F.3d 1118 (9th Cir. 2004).

SUMMARY OF ARGUMENT

The story of *Amica*'s litigation illustrates three basic problems that would be created if the probate exception were radically narrowed as Petitioner suggests.

First, a narrowed probate exception would unnecessarily undermine the state courts' ability to pronounce and apply state law. There is no question that the meaning and application of probate law is uniquely a state concern. This Court has long recognized that the federal courts have a responsibility to avoid unnecessarily intruding on the functions of state courts. The proceedings in *Snavely* v. *Miller* demonstrate that a robust and non-discretionary probate exception is required to protect the dignity of the state probate tribunals. Because the bankruptcy court refused to respect the limitations imposed on its jurisdiction by the probate exception, the state court judge in the case was subject to the indignity of federal injunctions that prevented her from completing the formality of filing a decision that she had already issued to the parties. Federal law contains numerous provisions and doctrines designed to prevent this kind of disrespect of state court proceedings. These devices include the Anti-Injunction Act, 28 U.S.C. § 2283, the requirement that federal courts give full faith and credit to state judgments, see *id.* § 1738, and the various federal abstention doctrines, see *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413 (1923); *Railroad Comm'n* v. *Pullman Co.*, 312 U.S. 496 (1941); *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943); *Younger* v. *Harris*, 401 U.S. 37 (1971); *Colorado River*

Water Conservation Dist. v. *United States*, 424 U.S. 800 (1976); *District of Columbia Court of Appeals* v. *Feldman*, 460 U.S. 462 (1983). The probate exception fulfills a similar role.

Second, a narrowed probate exception would create a danger of wasteful and repetitive litigation. The proceedings in *Snavely* v. *Miller* demonstrate that federal courts are not always loathe to set aside a state court's proceedings and to re-try issues of state law that have already been decided. By exceeding its jurisdiction, the federal tribunal rendered for naught the state court's laborious and painstaking work, allowing the relitigation of state-law issues that had already been resolved by a fully competent state court. This waste could have been avoided if the bankruptcy court had properly applied this Court's decisions limiting its jurisdiction. See, *e.g.*, *Harris* v. *Zion Sav. Bank & Trust Co.*, 317 U.S. 447, 450 (1943); *Sutton* v. *English*, 246 U.S. 199, 205 (1918); *O'Callaghan* v. *O'Brien*, 199 U.S. 89, 114-16 (1905); *Byers* v. *McAuley*, 149 U.S. 608, 619 (1893); *In re Broderick's Will*, 88 U.S. 503, 515-20 (1874); *Armstrong* v. *Lear*, 25 U.S. (12 Wheat.) 169, 175-76 (1827).

Finally, a narrowed probate exception will allow losing state-court litigants to engage in judicial gamesmanship, using federal court as a way of avoiding and overturning a state court's unfavorable rulings. If the probate exception is radically undermined as the Petitioner proposes, there is nothing to keep litigants from running to bankruptcy court the moment that a negative decision is announced from the state court bench. Because the bankruptcy stay is automatic, taking effect at the moment of filing, see 11 U.S.C. § 362, a party could literally station someone in the bankruptcy clerk's office with a cell-phone, waiting to file the moment that news of an adverse state opinion is announced and before it is recorded in the clerk's office. Except for the cell-phone, this is more or less what happened in *Snavely* v. *Miller*.

These are real rather than imaginary concerns. *Amica*'s experience illustrates that without a strong reaffirmation of this Court's probate-exception jurisprudence such judicial chaos – far from representing a bizarre and anomalous procedural train wreck – may become common place.

ARGUMENT

For nearly two centuries, this Court has held that the jurisdiction of the federal courts does not extend to probate matters. See *Armstrong* v. *Lear*, 25 U.S. (12 Wheat.) 169 (1827) (announcing the so-called probate exception). Instead, the Court has stated that "the right to succeed to the ownership of realty and personalty are peculiarly matters of state law," *Harris* v. *Zion Sav. Bank & Trust Co.*, 317 U.S. 447, 450 (1943), and affirmed that the probate exception exists because the "authority to make wills is derived from the state," *O'Callaghan* v. *O'Brien*, 199 U.S. 89, 110 (1905). More recent decisions by the circuit courts also emphasize this unique interest of state courts in probate-related matters. *Storm* v. *Storm*, 328 F.3d 941, 944 (7th Cir. 2003) ("[I]f state courts have the exclusive task of probating a will, and thus develop the relative expertise to do so (including the expertise to deal with all matters ancillary to probate), then federal court resolution of such matters is unlikely to be more than an unnecessary interference with the state system."); *Phillips, Nizer, Benjamin, Krim & Ballon* v. *Rosenstiel*, 490 F.2d 509, 516 (2d Cir. 1973) (recognizing that probate matters "raise issues 'in which the states have an especially strong interest and a well-developed competence for dealing with them'") (quoting Charles Alan Wright, *Federal Courts* § 25, at 84 (2d. ed. 1970); *Bassler* v. *Arrowood*, 500 F.2d 138, 142-43 (8th Cir. 1974) ("The area of probate and decedents' estates present many varied problems. State courts deal with these problems daily and have developed an expertise which should discourage federal court intervention. These local problems should be decided by state courts.") (citation omitted); cf. *Dragan* v. *Miller*, 679 F.2d 712, 715 (7th Cir. 1982) ("[T]here

is an argument – call it the argument from relative expertness – for confining the adjudication of probate-type issues to state court even when they arise in proceedings that otherwise might not be clearly classifiable as probate proceedings.").

Out of respect for this unique state interest, this Court has consistently held that the subject-matter jurisdiction of the federal courts does not extend to cases that interfere with state probate proceedings. See, *e.g.*, *Harris*, 317 U.S. at 450; *Sutton* v. *English*, 246 U.S. 199, 205 (1918); *O'Callaghan*, 199 U.S. at 114-16; *Byers* v. *McAuley*, 149 U.S. 608, 619 (1893); *In re Broderick's Will*, 88 U.S. 503, 515-20 (1874); *Armstrong*, 25 U.S. (12 Wheat.) at 175-76. Even the case of *Waterman* v. *Canal-Louisiana Bank & Trust Co.*, 215 U.S. 33, 46 (1909), relied on heavily by Petitioner Vicki Marshall, in which the Court upheld the jurisdiction of a federal court over a suit brought by an heir of an estate against the executor and other heirs, recognizes that the federal courts should "not interfere with the ordinary settlement of the estate" and "cannot interfere with the probate court in determining the amount of the residue arising from the settlement of the estate in the court of probate."

The Court has observed that without the probate exception "the conflict of jurisdictions would be irreconcilable and disastrous." *Bank of Tenn.* v. *Vaiden*, 59 U.S. 503, 507 (1855). This prediction has proven true as federal bankruptcy courts have recently allowed losing state-court litigants to raise their claims anew. It would be a mistake to think that the confrontation between state and federal courts that occurred in *Marshall* v. *Marshall* over Vicki Marshall's probate-related claims is an anomaly. As Ms. Snavely's case demonstrates, in the absence of a robust probate exception, the dangers of heavy-handed interference by federal courts with state court proceedings, wasteful and duplicative litigation, and judicial gamesmanship by litigants is all too real.

The probate exception is not some arcane anachronism. Rather, it safeguards basic values of judicial federalism. Our system of parallel state and federal judiciaries creates a need for special doctrines to prevent judicial over-reaching and abusive litigation tactics. In another context, this Court has observed:

> Understandably this dual court system [created by the Constitution] was bound to lead to conflicts and frictions. Litigants who foresaw the possibility of more favorable treatment in one or the other system would predictably hasten to invoke the powers of whichever court it was believed would present the best chance of success. Obviously this dual system could not function if state and federal courts were free to fight each other for control of a particular case. Thus, in order to make the dual system work and to prevent needless friction between state and federal courts, it was necessary to work out lines of demarcation between the two systems.

Atlantic Coast Line R.R. v. *Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 286 (1970) (internal quotations and citations omitted). The probate exception addresses these issues. It is one of the federalism-maintaining mechanisms that "prevent[s] needless friction between state and federal courts." Cf. *Oklahoma Packing Co.* v. *Oklahoma Gas & Elec. Co.*, 309 U.S. 4, 9 (1940).

In the absence of the probate exception, however, the process of settling an estate can go terribly wrong. The case of *Snavely* v. *Miller*, illustrates the very real – and regrettably routine – nature of the dangers that the probate exception was designed to guard against. Like *Marshall* v. *Marshall*, *Amica*'s case involves a battle between a federal bankruptcy court and a state probate court for jurisdiction over a state testamentary proceeding. And like the *Marshall* case, Ms. Snavely's case highlights a troubling lack of respect for state probate courts by the federal bankruptcy courts in question.

AMICA'S EXPERIENCE ILLUSTRATES THE REAL – AND ROUTINE – DANGERS THAT THE PROBATE EXCEPTION SHOULD GUARD AGAINST.

The procedural history of *Snavely* v. *Miller* demonstrates why a robust probate exception is necessary. Following a three-week trial of the testamentary issues, the state court in *Snavely* issued a detailed oral ruling in favor of Bonnie Snavely. Knowing that he had lost the case, Douglas Miller tried to escape the state court's judgment by hastily filing a bankruptcy petition before the state court could enter its written decision. Despite the state court's protestations that it had exclusive jurisdiction over the testamentary subject matter and despite the state court's attempt to enter judgment at the close of trial, the federal court seized jurisdiction over the case, ordered the parties to discontinue their participation in the state court's proceedings on penalty of contempt, and sanctioned Ms. Snavely for suggesting to the state court that the federal court lacked subject-matter jurisdiction. The federal court's disregard for the limitations on its jurisdiction transformed the judgment reached by the state court after a lengthy trial into a dead letter.

Not content simply to stay the state court's proceedings, the federal court conducted a complete re-trial of the testamentary issues that had been tried before the state court. At the close of that trial, the federal court ignored the detailed findings and conclusions of the state court and held exactly contrary to the state court on numerous issues of state law. Based on its own interpretation of state law and the facts, the federal court effectively reversed the state court's decision for Ms. Snavely and decided the issues for Mr. Miller.

As the facts of *Snavely* v. *Miller* demonstrate, the proper application of the probate exception to federal subject-matter jurisdiction carries significant implications for core matters of judicial federalism. The scenario of a federal court using its coercive power to halt ongoing state-court proceedings over the state judge's protestations, to sanction litigants for

participating in state-court proceedings, and to retry completely all of the issues decided by the state court undermines the dignity of state courts, lends to duplicative and wasteful litigation, and lets losing parties "game" the courts by running to the federal judiciary when state courts decide against them.

A. The *Snavely* v. *Miller* State Court Proceedings.

Douglas Miller and Bonnie Snavely are two of the three children of Margueritte Miller. During her life, Mrs. Miller transferred a portion of her real property, a Montana ranch ("the Ranch"), to a revocable living trust ("the Trust"), naming her children as beneficiaries. CR 31, Ex. 11.[2] The Trust had two purposes: first, to provide for Mrs. Miller's comfort and security during her lifetime, and second, to provide for the disposition of her property following her death. *Id.* at 2-10. In using a multi-purpose trust to dispose of her property upon death, Mrs. Miller was typical of the large number of Americans who use some combination of trusts and wills to plan their estates. See generally John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 Harv. L. Rev. 1108 (1984) (discussing the rise of will substitutes). Increasingly, these are the sort of complex probate disputes that are likely to touch on the jurisdiction of the federal courts.

Under the terms of the Trust, Ms. Snavely was named as trustee. CR 31, Ex. 11 at 1. In accordance with her duties as trustee, Ms. Snavely administered the Trust for several years. Mrs. Miller was the primary beneficiary of the Trust during her lifetime, and Ms. Snavely administered the Trust during this time to provide for her ailing mother. Mrs. Miller died on

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[2] References to "CR" are to the docket in Adversary Proceeding No. 01/00043 (Bankr. D. Mont. 2002). References to "CR*" are to the docket in Bankruptcy Case No. 01-30752 (Bankr. D. Mont. 2002). References to "ER" are to the Excerpt of Record filed before the Ninth Circuit in *Snavely* v. *Miller (In re Miller)*, No. 03-35317 (9th Cir. 2005).

August 26, 1995, CR 13, Ex. 16 at 10-11, and upon her death, the Trust became irrevocable. CR 31, Ex. 11 at 1-2. Mrs. Miller's death transformed the Trust into a device for distributing Mrs. Miller's wealth to her heirs. In accordance with the Trust's provisions, Ms. Snavely sought to liquidate it by purchasing the Ranch from the Trust and distributing the resulting cash among Mrs. Miller's heirs. CR* 72 at 5 n.5. As required by Washington law, in August 2000, Ms. Snavely petitioned the state court to obtain judicial approval of her trust administration and the proposed sale. CR* 33 at 2; see Wash. Rev. Code §§ 11.106.030, 11.100.140. Ms. Snavely filed the petition in Washington state court because the Trust was created in Washington by Mrs. Miller after she had become a Washington resident and is expressly governed by Washington law. CR 31, Ex. 11 at 23.

After Ms. Snavely filed an accounting of her management of the Trust as requested by the court, Mr. Miller filed objections to the accounting and to the sale of the Ranch, alleging that Ms. Snavely had engaged in self dealing and had breached her fiduciary duty as trustee in a number of different ways. CR* 33 at 2. This placed the entirety of Mrs. Miller's estate plan, including the Trust, its spendthrift provisions, and Ms. Snavely's administration of the Trust, into dispute. As a result of Mr. Miller's objections to the sale and the accounting, a lengthy trial was held in King County Superior Court before the Honorable J. Kathleen Learned.

In the pretrial proceedings, Mr. Miller repeatedly contested the jurisdiction of the state court, arguing that the Trust had expired and was not a valid spendthrift trust. The state court repeatedly rejected that argument, holding that, as a matter of state law, the Trust (and its spendthrift provisions) were valid and enforceable. See, *e.g.*, CR* 70, Exs. 2, 4. As a result, the state court held that it had subject-matter jurisdiction over the Trust and the related accounting issues. See, *e.g.*, *id.*

The state court conducted an extensive trial on these testamentary issues from February 6 to February 22, 2001,

hearing the testimony of numerous witnesses. On March 7, 2001, Judge Learned announced her factual findings and conclusions of law in open court. The court's oral ruling was detailed and exhaustive, covering essentially all of the issues raised by the parties and spanning 69 pages of written transcript, which was provided to the parties as her opinion. See CR* 33, Ex. B. In it, Judge Learned commented that she had "spent a lot of time" analyzing the complicated factual evidence and the applicable legal rules in light of the parties' arguments. *Id.* at 67. Based on this analysis, the court approved the sale of the Ranch to Ms. Snavely and the accounting filed by her, with some modifications. *Id.* at 24-63. In addition to these central issues, the court's oral ruling decided a host of related issues. The court found that there had been no self dealing on the part of Ms. Snavely and that she had not breached her fiduciary duties as trustee. *Id.* at 17, 25, 36. The court also approved the payment of Trust funds to Ms. Snavely for loans she had made to the Trust and for a variety of Trust-related expenses. *Id.* at 33-66. On each of these issues, Judge Learned's ruling explained in detail the court's reasons for its decision. In the end, the court determined that Mr. Miller owed Ms. Snavely (as trustee) approximately $1,010,104, including attorneys fees and interest. At the conclusion of the March 7, 2001, hearing, the court set March 21 as the date for the final entry of a written order in accordance with the oral ruling. *Id.* at 69.

B. The Losing Party's Use Of The Federal Courts To Interfere With The State Proceedings And Relitigate Decided Issues.

Two days before the scheduled hearing to enter the state court's final judgment, Mr. Miller commenced a Chapter 11 bankruptcy proceeding in Montana. CR* 1. Knowing that he had lost the state court trial, Mr. Miller sought a federal injunction against the state court proceedings, which were all but complete. On March 21, 2001, Judge Learned held the scheduled hearing to enter written findings of fact and

conclusions of law. CR* 20 at 5. Mr. Miller argued at that hearing that his bankruptcy case stayed the Washington state court proceedings. *Id.* Judge Learned considered the issue and disagreed. In a March 23, 2001, order, she ruled, (1) the Trust's spendthrift clause was valid and enforceable under Washington law, (2) the Trust's assets were therefore not property of Mr. Miller's bankruptcy estate under 11 U.S.C. § 541(c)(2), and (3) the automatic stay did not apply. CR* 33, Ex. D. That same day, the state court entered its written Findings of Fact and Conclusions of Law, which memorialized its oral ruling without significant alteration. CR* 33, Exs. C, E.

The Montana bankruptcy court then stepped in to reverse the Washington state court's order regarding applicability of the stay. CR* 3, 18. The bankruptcy court recognized that the applicability of the stay depended on the state-law issue of whether the anti-alienation clause in the Trust continued in force and effect. Even though the state court had already ruled exactly the opposite, the Montana bankruptcy court ruled that the state court was wrong as a matter of Washington state law. ER 10. Rejecting the state court's jurisdictional ruling, the bankruptcy court held that it had sole jurisdiction over the trust and probate matters that had been pending before the state court. ER 6. The bankruptcy court ordered Ms. Snavely to proceed no further in the state case, sanctioned Ms. Snavely for participating in the proceeding in which the state court entered its written order, and declared the state court's written order void. See ER 1-10.

Having brought the state proceedings to a halt and rendered the state court's judgment essentially ineffective, the bankruptcy court ordered Ms. Snavely to file a Proof of Claim on behalf of the Trust and individually. ER 13. Ms. Snavely did so. The bankruptcy court then conducted a complete re-trial of the issues related to the Trust that had been decided by the state court.

The bankruptcy court's re-trial began on October 29, 2001 and lasted four and one-half days. See CR 76. On January 25, 2002, the bankruptcy court issued a 55-page order ignoring the detailed findings of the state court and concluding contrary to the state court's resolution of nearly every single issue of fact and law. See ER 765-819. Where the state court had concluded that Ms. Snavely's administration of the Trust was appropriate, the bankruptcy court concluded that Ms. Snavely breached her fiduciary duties under state law. Where the state court concluded that Ms. Snavely's receipts and financial documents were largely correct when examined closely, the bankruptcy court concluded that Ms. Snavely had mismanaged and improperly documented her financial dealings on behalf of the Trust. Where the state court concluded that Ms. Snavely had acted in good faith as trustee and Mr. Miller had been unduly litigious and obstinate, the bankruptcy court concluded that Mr. Miller had always acted in good faith and that the fault for the animosity and litigation between the parties was Ms. Snavely's. Where the state court ordered Mr. Miller to pay Ms. Snavely's attorney fees, the bankruptcy court ordered Ms. Snavely to pay Mr. Miller's fees. And, as noted above, where the state court concluded that, as a matter of state law, the Trust continued through the winding up of its affairs, see CR* 33, Ex. D, the bankruptcy court concluded that the Trust had terminated under state law, see ER 1-10.

These are just a few of the examples of stark disagreement between the state court and the bankruptcy court on the numerous issues of fact and state law surrounding the administration of the Trust. It is no overstatement to say that the bankruptcy court's order is a polar opposite of the state court's oral and written rulings on the very same issues. This judicial tug-of-war demonstrates the need for this Court to reaffirm the probate exception in order to thwart the unwarranted meddling of federal courts resulting in unnecessary relitigation of previously decided issues and the

unscrupulous litigation tactics of disgruntled litigants attempting to game the system.

C. The Ninth Circuit's Failure To Prevent The Federal Court's Abuse Of The State Tribunal.

Ms. Snavely appealed to the United States District Court for the District of Montana, which affirmed the bankruptcy court's decision in a summary opinion. ER 842-57. Ms. Snavely then filed an appeal with the Ninth Circuit Court of Appeals. ER 858-60. As part of that appeal, Ms. Snavely argued that the bankruptcy court lacked subject-matter jurisdiction over the testamentary issues that were pending before the state court under the probate exception.

While Snavely's appeal was pending, the Ninth Circuit issued its opinion in *Marshall* v. *Marshall* (*In re Marshall*), 392 F.3d 1118 (9th Cir. 2004). That case also involved an attempt to use bankruptcy proceedings to stay ongoing state court proceedings under a will and *inter vivos* trust and relitigate in a federal bankruptcy court issues already decided by a state tribunal. The Ninth Circuit in *Marshall* provided a detailed discussion of the case law governing the probate exception, explicitly ruling that it extended well beyond merely probating a will or administering an estate. *Id.* at 1133 ("The reach of the probate exception encompasses not only direct challenges to a will or trust, but also questions which would ordinarily be decided by a probate court in determining the validity of the decedent's estate planning instrument."). Accordingly, in *Marshall* the Ninth Circuit held that the bankruptcy court had erred in assuming jurisdiction over a case involving the validity of an alleged *inter vivos* trust.

The *Marshall* opinion was brought to the attention of the *Snavely* panel by means of a letter filed under Federal Rule of Appellate Procedure 28(j) but to no avail. The panel affirmed in a memorandum opinion, concluding without discussion that: (1) the probate exception "prohibits a federal court *only*

from probating a will or administering an estate"; and (2) the bankruptcy court's actions in no way interfered with the state court's proceedings. *Snavely* v. *Miller (In re Miller)*, 124 Fed. Appx. 495, 498 (9th Cir. 2005), *available at* 2005 WL 281387 (emphasis added) (citation omitted). Thereafter, Ms. Snavely's petition for panel rehearing and rehearing *en banc* were also denied.

* * * *

The tortuous course of *Amica*'s litigation illustrates that the dangers against which the probate exception guards are real. In many ways, the facts that resulted in the "disastrous" "conflict of jurisdictions," *Bank of Tennessee*, 59 U.S. at 507, in both *Marshall* v. *Marshall* and *Snavely* v. *Miller* seem exotic and anomalous. Two such cases coming to this Court in a single term, however, testifies to the fact that without a strong re-affirmation of the probate exception, such wasteful and dangerous confrontations between state and federal courts will continue to occur.

The probate exception should protect state judges from the meddling interference of the federal courts. In *Amica*'s case, Judge Learned had engaged in an exacting and laborious analysis of the complex state probate law claims at issue in the case. Such diligence and expertise on the part of the state courts ought to be accorded respect by the federal courts. Because the bankruptcy court exceeded its jurisdiction, however, Judge Learned's work was peremptorily swept aside, and she was subjected to the indignity of having proceedings in her court enjoined by a distant federal tribunal.

Aside from the disrespect such interference shows to state courts, it constitutes a tremendous waste of judicial resources. All of the issues in *Amica*'s case had been thoroughly heard and decided by Judge Learned. By ignoring the probate exception, the federal court not only rendered the effort of the state adjudication for naught, but engaged in a second lengthy

proceeding to re-decide all of the same state-law issues. This massive expenditure of judicial effort was not necessary.

Finally, *Amica*'s case illustrates the way that the probate exception prevents judicial gamesmanship. Our courts exist to provide an orderly and impartial resolution of disputes. This function is decisively undermined when a party can test the waters in state court with the knowledge that one can avoid an adverse state ruling by running to bankruptcy court before the formalities of issuing an order in the state court are complete. The limitation on a federal court's jurisdiction to interfere in an on-going state probate case prevents such abusive tactics.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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January 20, 2006

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In the Supreme Court of the United States

VICKIE LYNN MARSHALL,
Petitioner,

v.

E. PIERCE MARSHALL,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF TEXAS, ALABAMA, COLORADO, LOUISIANA, MARYLAND, MISSISSIPPI, MISSOURI, AND OREGON AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether, on the facts of this case, the "probate exception" bars the exercise of bankruptcy jurisdiction over a cause of action that, under applicable Texas probate law, Petitioner was required to assert, and actually did assert unsuccessfully, in a Texas probate proceeding that Petitioner herself initiated prior to commencing her bankruptcy case.

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INTEREST OF *AMICI CURIAE*

The State *amici curiae*, through their Attorneys General, respectfully submit this brief in support of Respondent. The Court has recognized that "the settlement and distribution of decedents' estates and the right to succeed to the ownership of realty and personalty are peculiarly matters of state law." *Harris v. Zion Sav. Bank & Trust Co.*, 317 U.S. 447, 450 (1943). The States have exercised their broad authority in this area by crafting differing substantive laws and procedures to regulate the disposition of their citizens' estates.

These state probate systems have developed against an important background principle of federalism that has been established in the Court's jurisprudence for almost two centuries: the "probate exception" to federal courts' subject-matter jurisdiction. This doctrine prescribes that federal courts may not exercise jurisdiction over actions that would interfere with state probate proceedings.

One significant element of the probate exception is that whether a particular exercise of federal jurisdiction will "interfere" with state probate proceedings requires reference to state probate law. In this manner, the probate exception respects the States' policy determinations that certain claims are integral to probate proceedings and should be resolved in a specific state court. Thus, States have long understood that their choices in classifying probate-related matters as ancillary to or independent of probate will bear on whether those matters can be pursued outside of their probate systems in a federal forum.

Petitioner now urges the Court to adopt a overly narrow view of the extent to which state probate law defines the scope of the probate exception. Her position not only contravenes the Court's established precedents on this issue, but also threatens to upset the States' settled expectations regarding the line between federal- and state-court jurisdiction in probate-related matters. The *amici* States submit this brief to rebut this aspect of Petitioner's argument.

SUMMARY OF THE ARGUMENT

Petitioner challenges the court of appeals's application of the probate exception in this case in part because she believes the court improperly allowed state probate law to dictate the scope of the lower courts' subject-matter jurisdiction. Pet'r Br. 42-49. In fact, the court of appeals's approach is well-grounded in the Court's probate-exception jurisprudence. Federal courts may not exercise jurisdiction over claims that would "interfere with the probate proceedings," *Markham v. Allen*, 326 U.S. 490, 494 (1946), and what constitutes "interference" necessarily depends on considerations of state probate practice. Thus, in applying the probate exception, the Court has consistently examined state probate law to establish whether federal subject-matter jurisdiction exists. *See infra* Part I.

This incorporation of state law as a reference point does not offend the principle that state statutes cannot limit federal jurisdiction. The probate exception—like its cognate doctrine, the domestic-relations exception—exists as a presumption against jurisdiction, which, over time, has become integrated into federal jurisdictional statutes via congressional acquiescence. As such, the States have not usurped federal jurisdiction through their probate legislation; rather, Congress has exercised its authority to define lower federal courts' jurisdiction by adopting a limitation that is fixed in part by reference to state law. *See infra* Part II.

As with the domestic-relations exception, sound policy reasons also support the deference to state law embodied in the probate exception. This doctrine respects the integrity of state probate systems, which are unique and frequently administered by specialized courts and judges. Moreover, resolution of probate-related matters in a single state forum promotes judicial economy and provides the certainty and finality that are critical to effective estate planning. *See infra* Part III.

ARGUMENT

I. THE STATES' PROBATE LAWS INFORM THE SCOPE OF THE PROBATE EXCEPTION TO FEDERAL COURTS' SUBJECT-MATTER JURISDICTION.

The probate exception to federal courts' subject matter jurisdiction evolved through a series of over thirty decisions from the Court, from the doctrine's origin in *Armstrong v. Lear*, 25 U.S. (12 Wheat.) 169 (1827), to its most recent description in *Markham*. In the latter decision, the Court distilled these precedents into various metes and bounds demarcating the matters reserved to the state courts under the probate exception. First, "a federal court has no jurisdiction to probate a will or administer an estate." *Markham*, 326 U.S., at 494. Second, a federal court sitting in equity has jurisdiction over suits to establish claims against a decedent's estate "so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court." *Id.* Finally, a federal court has jurisdiction to adjudicate rights to property in the custody of a state probate court provided its judgment "does not undertake to interfere with the state court's possession save to the extent that the state court is bound by the judgment to recognize the right adjudicated." *Id.*

The question whether a federal court's exercise of jurisdiction will "interfere" with probate proceedings, probate jurisdiction, or the probate court's custody of estate property necessarily requires some consideration of state probate practice. In several decisions leading to *Markham*, the Court examined and refined the extent to which a State's peculiar probate law bears on the "interference" boundary of federal jurisdiction. This line of cases establishes that (1) federal courts have jurisdiction over probate-related claims that are independent actions *inter partes*, but not those that are ancillary to state probate proceedings; (2) the categorization of these claims

is a matter of state law; and (3) the relevant considerations under state law are the substance of the claim and the court to which it is assigned.

A careful review of the formation and growth of the probate exception in this Court's jurisprudence sheds considerable light on the question before the Court in the case at bar.

A. *In re Broderick's Will.*

The Court's first extensive review of state probate law as a factor bearing on federal jurisdiction occurred in *In re Broderick's Will*, 88 U.S. (21 Wall.) 503 (1874).[1]

Several alleged heirs brought a suit in equity in federal court to set aside the probate of a will and to recover the decedent's estate. *Id.*, at 504. The defendants sought dismissal in part on the ground that the federal court lacked subject-matter jurisdiction over the suit. *Id.*, at 508. Affirming that dismissal, the Court relied upon the general rule that "a court of equity will not entertain jurisdiction of a bill to set aside a will or the probate thereof." *Id.*, at 509. One of the principal reasons undergirding this rule, the Court explained, was that "the probate courts themselves have all the powers and machinery necessary to give full and adequate relief." *Id.*, at 510. Testing that rationale in the instant case, the Court exhaustively reviewed California's probate laws and procedures, *id.*, at 514-17, and pronounced that "it is difficult to conceive of a more complete and effective probate jurisdiction," *id.*, at 517. That assessment was dispositive of the jurisdictional question:

> "On the establishment or non-establishment of the will depended the entire right of the parties; and that was a

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1. The probate exception itself traces its roots even further back in the Court's case law, all the way to the 1827 decision in *Armstrong v. Lear*, 25 U.S. (12 Wheat.) 169 (1827).

> question entirely and exclusively within the jurisdiction of the Probate Court. In such a case a court of equity will not interfere, for it has no jurisdiction to do so. The Probate Court was fully competent to afford adequate relief." *Id.*

Having decided to affirm the dismissal, the Court referred in *dictum* to another way in which state probate law might bear on federal subject-matter jurisdiction. The alleged heirs had relied in part on a California statute that purportedly afforded an equitable remedy, available in courts of general jurisdiction, to set aside wills obtained by fraud, undue influence, and similar means. *Id.*, at 519. The Court agreed that federal courts "probably" could exercise concurrent jurisdiction over such state-law remedies respecting estates that sounded in equity rather than probate, but noted that any action by the heirs under this provision was barred by the statute of limitations. *Id.*, at 520.

B. *Gaines v. Fuentes.*

The following Term, the Court relied upon the *Broderick's Will dictum* to find federal removal jurisdiction over an action seeking to annul a probated will in *Gaines v. Fuentes*, 92 U.S. 10 (1875).

After distribution of the decedent's estate pursuant to the completed probate, the decedent's daughter (and heir) filed several suits in federal court to recover certain real estate, using the probated will as evidence of her title. *Id.*, at 11. The defendants in these suits—persons with competing interests in the properties—filed their own action in the state probate court, seeking to set aside the probate. *Id.* The daughter sought to remove this action to federal court, but this request was denied on the ground that federal courts lack subject-matter jurisdiction over probate matters. *Id.*, at 11-12. The probate court annulled the will and the Supreme Court of Louisiana affirmed. *Id.*, at 12.

On writ of error, the Court revisited the issue of removal jurisdiction. The Court expressly approved the holding of *Broderick's Will*, *id.*, at 21, but relied on that decision's *dictum* regarding available state-law equitable actions in general-jurisdiction courts as conclusive of the jurisdictional question. In doing so, however, the Court did not engage in the careful analysis of state law it had previously prescribed. Rather, the Court simply decreed that the action to annul the will was "in all essential particulars, a suit for equitable relief"—notwithstanding its acknowledgment that Louisiana law did not characterize the claim as sounding in equity. *Id.*, at 20. Moreover, the Court further departed from *Broderick's Will* by suggesting that it was sufficient that the claim could be brought in *any* state court, "whatever designation that court may bear." *Id.* Satisfied that the will-annulment action was essentially a claim in equity that may be prosecuted in a state court, the Court held that federal courts could exercise concurrent jurisdiction and removal was proper. *Id.*, at 22.

C. *Ellis v. Davis.*

Eight years later, in *Ellis v. Davis*, 109 U.S. 485 (1883), the Court again had occasion to address a Louisiana probate case. This time, the Court did analyze Louisiana probate law in detail. As a result of that analysis, the Court not only held that there was no federal jurisdiction over the probate-related claim at issue, but also was compelled to cabin in its earlier anomalous decision in *Gaines*.

In *Ellis*, the decedent's will named as sole legatee of her estate one Jefferson Davis, former president of the Confederacy, who had the will probated in Louisiana probate court. *Ellis*, 109 U.S., at 487-88. Several alleged heirs of the decedent filed a suit in equity in federal court, seeking to set aside the probate and annul the will, to annul an *inter vivos* conveyance of certain property to Davis, to order an accounting of estate property, and to establish title to the

estate property in themselves. *Id.*, at 491-92. The lower court dismissed the case, and this Court affirmed. *Id.*, at 493, 504.

The Court cited the "settled" rule of *Broderick's Will* that federal courts did not have equity jurisdiction to annul a probate judgment or to declare a will invalid. *Id.*, at 494. The rationale for this rule, the Court explained, was that, "from a time anterior to the adoption of the constitution . . . all probate and testamentary matters hav[e] been confided either to separate courts of probate, under different denominations, or a special jurisdiction over them ha[s] been vested in courts having jurisdiction also over other subjects." *Id.*, at 495.

Although the Court described this general rule regarding purely probate matters in universal terms, it then explained how distinctions in state probate law could affect federal jurisdiction. First, the Court noted that, unlike in English practice, the States' probate jurisdiction extended both to wills of land and personal property, "but with varying effect in different [S]tates." *Id.* In some States, the probating of a will bound all persons for all purposes until set aside, whereas in others, probate was conclusive only as to personalty and only for administrative purposes—and thus could not serve as evidence of title to devises. *Id.*, at 495-96. In States in the former category, the Court observed, challenges to the validity of a will or the legality of probate "are generally regarded as the exercise of probate jurisdiction, even if administered in courts other than that of original probate." *Id.*, at 496. By contrast, in States of the latter sort, the validity of a will "may become a question to be tried whenever and wherever a litigation arises concerning real property." *Id.* In these latter States, the Court explained, because their "courts of general civil jurisdiction" may resolve issues concerning the validity of wills as part of a suit involving title to real estate, federal courts likewise have concurrent jurisdiction over such suits (provided, of course, that other prerequisites to federal jurisdiction are present). *Id.*

Similarly, if a State provided for an action *inter partes* to challenge collaterally the probate of a will, federal courts also would have jurisdiction over such actions. *Id.*

Having set out these governing principles, the Court described its jurisdictional inquiry as turning on "whether the complainants are entitled, under the laws of Louisiana, to draw in question, in this mode and with a view to the decree sought, the validity of the will of [the decedent] and the integrity of its probate." *Id.*, at 499. To that end, the Court surveyed Louisiana law and derived the following rules: (1) if the probate proceeding is pending, then claimants to estate property must file their actions in probate court; (2) if, however, the probate proceeding has concluded, and a claimant to real property seeks to establish title as against a person asserting title by virtue of the probated will, the claimant must bring an "action of revendication" in the courts of general jurisdiction. *Id.*, at 499-502. Consistent with its general description of state law earlier in the opinion, the Court noted that federal courts could exercise jurisdiction only over the latter type of claim. *Id.*, at 502.

Applying these rules to the instant case, the Court concluded that the alleged heirs' claim was in substance a revendication action. *Id.*, at 503. Because such an action was an adequate and available *legal* remedy under Louisiana law, however, the Court could not exercise the equity jurisdiction invoked by the alleged heirs and dismissed the suit. *Id.*

This conclusion ostensibly conflicted with the Court's holding in *Gaines* that a very similar action was "essentially" a claim in equity that fell within the federal courts' equitable jurisdiction. The Court resolved this apparent inconsistency by noting that it simply "assumed" in *Gaines* that such equitable relief was available in Louisiana courts and that "*if* it were" it could be removed to federal court. *Id.* at 498-99 (emphasis added); *see also id.*, at 503 (explaining that "the point decided in [*Gaines*] was not that [the

action] would lie, according to the law of Louisiana, but that if it would lie in the state court it was removable"). Notwithstanding this reconciliation of the two cases, the plain import of *Ellis* was that an accurate appraisal of state probate law is essential to deciding whether federal jurisdiction exists.

D. *O'Callaghan v. O'Brien.*

The Court exhaustively reviewed the foregoing three decisions in *O'Callaghan v. O'Brien*, 199 U.S. 89 (1905), and derived a clearer set of principles governing the extent to which state probate law informs the boundaries of federal subject-matter jurisdiction.

In *O'Callaghan*, two alleged heirs of the decedent filed an action to set aside an oral will that had been probated in a Washington state court. *Id.*, at 90-91. The district court entered a decree in favor of the alleged heirs setting aside the oral will, holding that the state court lacked jurisdiction over the probate, and declaring that the alleged heirs were entitled to shares in the estate. *Id.*, at 93. The court of appeals reversed the judgment in part for lack of subject-matter jurisdiction. *Id.*

In addressing the jurisdictional question, the Court reviewed its earlier decisions in *Broderick's Will*, *Gaines*, and *Ellis*, 199 U.S., at 102-10, and then undertook to "deduce the principles established by the foregoing authorities as to the power of a court of the United States over the probate or revocation of the probate of a will," *id.*, at 110. The Court found that two main precepts were "clearly established." *Id.* First, "matters of pure probate" are not within federal courts' subject-matter jurisdiction. *Id.* Second, "where a state law, statutory or customary, gives to the citizens of the state, in an action or suit *inter partes*, the right to question at law the probate of a will or to assail probate in a suit in equity," federal courts have subject-matter jurisdiction over such suits, provided other jurisdictional prerequisites are met. *Id.*

The Court acknowledged, however, that there may be disagreement regarding what constitutes an "action or suit *inter partes*" within the second proposition. *Id.* Again relying on its precedents, the Court explained that the meaning of this phrase turns on the classification of the claim under state law:

> "[T]he words referred to must relate only to independent controversies *inter partes*, and not to mere controversies which may arise on an application to probate a will because the state law provides for notice, or to disputes concerning the setting aside of a probate, when the remedy to set aside afforded by the state law is a mere continuation of the probate proceeding; that is to say, merely a method of procedure ancillary to the original probate, allowed by the state law for the purpose of giving to the probate its ultimate and final effect." *Id.*

Thus, the nature of the remedy afforded by state law—whether independent of, or ancillary to, a state probate proceeding—controls whether a given action is within the jurisdiction of the federal courts. *See id.*

The Court specifically noted that this limit on the scope of actions *inter partes* cognizable in the federal courts was necessary to the effective functioning of probate. *See id.*, at 110-11. Otherwise, a State could not permit interested persons to raise questions regarding the propriety of the probate "without depriving itself of its concededly exclusive authority over the probate of wills." *Id.*, at 111.

Applying this principle to the instant case, the Court explained that federal jurisdiction over the suit to annul the probate turned on Washington probate law:

> "[I]n order to test the question of the jurisdiction of the circuit court over the relief prayed for in the bill . . . requires

> us to determine whether, by custom or by the statute law of the state of Washington, the courts of that state had the power of administering the relief prayed for on that subject in the bill by an independent suit, as distinguished from the exercise of probate jurisdiction originally or merely ancillary." *Id.*

The Court then conducted a detailed review of Washington statutes regarding probate procedure and challenges to wills, *id.*, at 112-14, and concluded that the alleged heirs' suit was necessarily a probate matter and not an action *inter partes*:

> "[T]he sections in question authorize a proceeding for contest only before the court which has admitted the will to probate or rejected the application made for probate, and that the authority thus conferred concerning the contest is an essential part of the probate procedure created by the laws of Washington, and does not, therefore, cause a contest, when filed, to become an ordinary suit between parties." *Id.*, at 114.

For this reason, the Court affirmed the court of appeals's decision dismissing the suit for lack of subject-matter jurisdiction. *Id.*, at 116.

The Court also made clear that the substance of the action, rather than the form in which it was pleaded, was the relevant inquiry. The alleged heirs contended that references in Washington case law to will contests as "suits" or "actions" indicated that such claims were actions *inter partes*. *Id.*, at 115. The Court rejected this argument on the ground that "the substantive nature of a will contest" under Washington law was a probate matter. *See id.*, at 115-16. Similarly, the Court held that the alleged heirs' due-process challenges were subordinate to claims that properly could have been asserted under Washington probate law, and thus did not provide a basis for federal jurisdiction. *See id.*, at 116-19.

E. *Sutton v. English*.

In *Sutton v. English*, 246 U.S. 199 (1918), the Court reaffirmed that, in evaluating whether a particular suit is an independent action *inter partes* or a claim ancillary to probate, it is necessary to consider both the substance of the claim under state law and the court to which state law assigns resolution of the claim.

Several heirs of a Texas decedent brought a suit in equity in federal court seeking to set aside various instruments and judgments that purported to dispose of the community property acquired by the decedent during her marriage. *Id.*, at 203-04. First, they raised various arguments to set aside a probated joint will by the decedent and her husband that established a charitable trust in the community property following the husband's death. *Id.*, at 202, 203-04. Second, they sought to set aside a state-court judgment obtained by the trustees establishing the trustees' title to the trust property. *Id.*, at 202-03, 204. Third, they requested that one provision of the decedent's individual will be annulled to the extent it purported to bequeath the residue of the community property to a single heir. *Id.* Finally, having established through the previous claims that the decedent's community property remained in her estate, the heirs sought a decree declaring that this property passed to them as her heirs at law. *Id.*, at 203, 204. The district court dismissed the suit for lack of subject matter jurisdiction, holding that the claims must be brought in Texas probate court. *Id.*, at 200.

In reviewing the dismissal for want of jurisdiction, the Court first restated the principles established by its earlier probate-exception cases: (1) federal courts lack jurisdiction over purely probate matters; (2) federal courts do have jurisdiction over "independent" suits *inter partes* involving wills and probate, but not suits "incidental or ancillary to the probate"; and (3) claims "relating to the interests of heirs, devisees, or legatees, or trusts affecting such interests, *which may be determined without*

interfering with probate or assuming general administration" are within federal courts' subject matter jurisdiction. *Id.*, at 205 (emphasis added).

The heirs claimed that the district court had jurisdiction over their suit because Texas courts of general jurisdiction would have had jurisdiction over a similar suit. *Id.* The Court noted that "to test this, we must consider the nature and extent of the jurisdiction of the courts referred to, as established by the Constitution of Texas and statutes passed in pursuance thereof." *Id.*, at 205-06.

After reviewing the relevant statutes, the Court concluded that a Texas court of general jurisdiction might have power to adjudicate the equitable claims to construe the joint will establishing the trust, to set aside the judgment in favor of the trustees, and to partition the estate among the heirs at law. *Id.*, at 206-07. That said, the Court observed that, even if the heirs prevailed on these three claims, they would recover nothing unless they also obtained relief on their remaining claim to annul the portion of the decedent's individual will that bequeathed the estate's community property to a single heir. *Id.*, at 207. Under Texas law, such a claim was part of the probate process and thus was within the exclusive jurisdiction of the probate court. *Id.*, at 207-08. Accordingly, the Court concluded that there was no federal jurisdiction over the suit in its entirety:

> "The present suit being, in an essential feature, a suit to annul the will of [the decedent], and a proceeding of this character being by the laws of Texas merely supplemental to the proceedings for probate of the will and cognizable only by the probate court, it follows from what we have said that the controversy is not within the jurisdiction of the courts of the United States." *Id.*, at 208.

In sum, this line of decisions concluding with *Sutton* establishes that particulars of state probate law—such as how a probate-related action is substantively classified and which state court may exercise

jurisdiction over the action—significantly inform the scope of the probate exception to federal courts' subject-matter jurisdiction.

II. INCORPORATING CONSIDERATIONS OF STATE PROBATE LAW INTO THE PROBATE EXCEPTION DOES NOT VIOLATE THE PRINCIPLE THAT STATE LAW CANNOT OUST FEDERAL COURTS OF SUBJECT-MATTER JURISDICTION.

Petitioner nevertheless contends that considerations of state law cannot shape the federal courts' jurisdiction over probate-related matters, citing the Court's precedents in various probate-related cases as well as the Supremacy Clause. Pet'r Br. at 44-46. In both respects, however, Petitioner's reliance on these authorities is misplaced.

A. The Court Has Not Rejected the Principle That Federal Subject-Matter Jurisdiction Over Probate-Related Issues Is Defined in Part by State Law.

Petitioner quotes the following passage from *Waterman v. Canal-Louisiana Bank & Trust Co.*, 215 U.S. 33 (1909), to support her claim that the Court has rejected any notion that state probate law can affect the extent of federal courts' jurisdiction:

> "[I]nasmuch as the jurisdiction of the courts of the United States is derived from the Federal Constitution and statutes, that in so far as controversies between citizens of different States arise which are within the established equity jurisdiction of the Federal courts . . . the jurisdiction may be exercised, *and is not subject to limitations or restraint by state legislation establishing courts of probate and giving them jurisdiction over similar matters.*" Pet'r Br. 44 (quoting *Waterman*, 215 U.S., at 43 (emphasis added)).

But Petitioner fails to mention that, after making this general statement, the Court then noted "[t]his rule is subject to certain qualifications." *Waterman*, 215 U.S., at 44. Among the

"qualifications" outlined by the Court was the principle announced in *O'Callaghan*, discussed *supra*, that state-law classification of a claim as "ancillary" to probate meant that such an action fell outside of federal courts' subject-matter jurisdiction. *See Waterman*, 215 U.S., at 44-45 (discussing *O'Callaghan*). And nine years later, in *Sutton*, the Court cited *Waterman* for the proposition that federal courts could entertain claims relating to the interests of heirs and devisees, but only insofar as they "may be determined without interfering with probate." *Sutton*, 246 U.S., at 205 (citing *Waterman*, 215 U.S., at 43).

B. Because the Probate Exception Exists Today as a Legislatively-Accepted Limitation of Federal Courts' Jurisdiction, It Does Not Violate the Supremacy Clause.

The modern justification for the probate exception removes any doubt that its fixing of federal-court jurisdiction by reference to state law does not violate the Supremacy Clause. That justification is revealed in the Court's explication of the cognate jurisdictional limitation for domestic-relations cases in *Ankenbrandt v. Richards*, 504 U.S. 689 (1992).

In *Ankenbrandt*, the Court granted certiorari to consider whether the domestic-relations exception was in fact a limit on federal courts' subject-matter jurisdiction, despite its not appearing in any constitutional provision or statute defining such jurisdiction. *See* 504 U.S., at 692. Reviewing Article III of the Constitution and the Court's domestic-relations jurisprudence, the Court concluded first that the exception was not of constitutional dimension. *Id.*, at 695-97. This assessment was not dispositive of the issue, however, because the Court noted that Congress does not necessarily invest lower federal courts with all the jurisdiction authorized by the Constitution. *Id.*, at 697 (citing *Palmore v. United States*, 411 U.S. 389, 401 (1973)). Rather, in establishing the lower courts, Congress can withhold some matters from their jurisdiction that

would otherwise be within the judicial power of the United States under Article III. *See id.*, at 698. To test whether the domestic-relations exception was one such reservation of jurisdiction, the Court turned to the federal jurisdictional statutes. *Id.*

The Court examined the Judiciary Act of 1789 establishing lower federal courts, noting that it limited these courts' jurisdiction to "suits of a civil nature at common law or in equity" where the requisite amount in controversy and diversity of citizenship among the parties was satisfied. *Id.* (quoting Act of Sept. 24, 1789, §11, 1 Stat. 73, 78). The Court identified this language as the source of the domestic-relations exception, citing its seminal decision in *Barber v. Barber*, 62 U.S. (21 How.) 582 (1858). Specifically, because the English courts in chancery lacked jurisdiction over the subjects of divorce and alimony—such matters being committed to the ecclesiastical courts—it followed that these subjects were not within the meaning of "suits of a civil nature at common law or equity" when Congress extended federal jurisdiction over such actions in 1789. *See Ankenbrandt*, 504 U.S., at 698-99 (discussing *Barber*); *see also Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 383-84 (1930) (explaining domestic-relations exception as rooted in the precept that Congress did not confer federal jurisdiction over matters that had formerly been within the province of the ecclesiastical courts).

The Court then explained that, although there was much debate over whether this initial justification for the domestic-relations exception was historically accurate, such an inquiry was no longer relevant. *See Ankenbrandt*, 504 U.S., at 699-700. Rather, because this longstanding construction of the Judiciary Act was not disturbed by Congress when it amended the Act in 1948, the Court held that the domestic-relations exception had effectively been integrated into the Act as a limit on federal courts' diversity jurisdiction:

> "When Congress amended the diversity statute in 1948 to replace the law/equity distinction with the phrase "all civil actions," we presume Congress did so with full cognizance of the Court's nearly century-long interpretation of the prior statutes, which had construed the statutory diversity jurisdiction to contain an exception for certain domestic relations matters. With respect to the 1948 amendment, the Court has previously stated that no changes of law or policy are to be presumed from changes of language in the revision unless an intent to make such changes is clearly expressed. With respect to such a longstanding and well-known construction of the diversity statute, and where Congress made substantive changes to the statute in other respects, we presume, absent any indication that Congress intended to alter this exception, that Congress adopted that interpretation when it reenacted the diversity statute." *Id.*, at 700-01 (citations and quotations omitted).

In other words, the domestic-relations exception presently stands as a presumption against federal subject-matter jurisdiction—to the extent described by the Court's precedents—which may be rebutted by a clear expression of congressional intent. *See id.*

This interpretation applies with equal force to the probate exception, which shares a similar history. The probate exception pre-dates the domestic-relations exception by over thirty years, and thus has a even lengthier and more established pedigree in the Court's jurisprudence. *Compare Armstrong v. Lear*, 25 U.S. (12 Wheat.) 169 (1827) (probate exception), *with Barber v. Barber*, 62 U.S. (21 How.) 582 (1858) (domestic-relations exception). Also, as with domestic relations, the historical justification for excepting probate issues from federal courts' jurisdiction was that, in England, the ecclesiastical courts possessed exclusive jurisdiction over such matters. *See Broderick's Will*, 88 U.S. (21. Wall.), at 512-14; *Armstrong*, 25 U.S. (12 Wheat.), at 175-76. Accordingly,

under the logic of *Ankenbrandt*, when Congress amended the diversity statute in 1948 without expressing any intent to disturb the probate exception, it likewise incorporated that exception as an implicit limitation on federal courts' diversity jurisdiction. *Cf. Ankenbrandt*, 504 U.S., at 700-01.

For the same reasons, the probate exception also delimits federal-question and bankruptcy jurisdiction. The Court has treated the probate exception as applicable in these types of cases. *Markham*, 326 U.S., at 494 (federal question); *Harris v. Zion Sav. Bank & Trust Co.*, 317 U.S. 447, 450 (1943) (bankruptcy). And the statutes establishing these forms of jurisdiction have also since been amended by Congress without any apparent intent to disturb the Court's construction of these jurisdictional grants as being circumscribed by the probate exception. *See* 1948 Judicial Code & Judiciary Act, ch. 646, 62 Stat. 930 (1948) (codified as amended at 28 U.S.C. §1331) (federal question); Act of July 10, 1984, Pub. L. 98-353, §101, 98 Stat. 333 (1984) (codified as amended at 28 U.S.C. §1334) (bankruptcy). Thus, the probate exception, as defined by the Court, currently exists as an implicit limitation on federal courts' jurisdiction that has been incorporated into federal law by congressional acquiescence. *Cf. Ankenbrandt*, 504 U.S., at 700-01.

Because Congress has accepted the Court's probate-exception jurisprudence as an integral component of the federal jurisdictional statutes, the fact that state law plays a role in defining the scope of the exception does not offend the Supremacy Clause. That is, when a State defines a particular claim as ancillary to its probate proceedings, the probate exception does not impermissibly elevate that state action as *superseding* federal law. Rather, the State's decision simply fixes the value of a *variable* that Congress itself has accepted as part of the calculus defining federal courts' jurisdiction in probate-related cases.

There is nothing improper, or even unusual, about a line between federal- and state-court jurisdiction that is contingent on state-law principles that may vary from one State to the next. Indeed, Congress has drawn such lines explicitly in several statutes. For example, the Tax Injunction Act provides that: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. §1341. As with the probate exception, this Act has been interpreted as a limitation on federal courts' jurisdiction. *Osceola v. Fla. Dep't of Revenue*, 893 F.2d 1231, 1232 (CA11 1990); *May v. Supreme Court*, 508 F.2d 136, 137 (CA10 1974). This jurisdictional limitation is necessarily contingent on state law—*i.e.*, whether a State's courts can provide "a plain, speedy, and efficient remedy." 28 U.S.C. §1341. Consequently, when the Act is otherwise implicated, a federal court's jurisdiction can rise or fall depending on the particulars of state law. *See, e.g., Washington v. Linebarger, Goggan, Blair, Pena & Sampson, LLP*, 338 F.3d 442, 444-45 (CA5 2003) (holding that particular remedies available under Louisiana law deprived federal courts of jurisdiction under Act); *Alcan Aluminum Ltd. v. Dep't of Revenue*, 724 F.2d 1294, 1297 (CA7 1984) (holding that ambiguities in Oregon law precluded application of Act as jurisdictional bar).[2]

Likewise, the Civil Rights Removal Act, which extends federal removal jurisdiction over actions not otherwise within a jurisdictional grant, conditions that jurisdiction in part on whether

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2. Similarly, the Johnson Act deprives federal courts of jurisdiction to enjoin state agencies' utility rate orders if the state courts provide a "plain, speedy and efficient remedy." 28 U.S.C. §1342; *Tennyson v. Gas Serv. Co.*, 506 F.2d 1135, 1141-42 (CA10 1974) (holding that remedies available under Kansas law deprived federal court of jurisdiction over utility customers' federal class action).

the defendant can "enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States." 28 U.S.C. §1443. The Court has explained that federal jurisdiction in this regard thus requires "reference to a [state] law of general application that the defendant will be denied or cannot enforce the specified federal rights in the state courts." *State v. Rachel*, 384 U.S. 780, 800 (1966).

If Congress may explicitly condition a grant of federal jurisdiction on considerations of state law, it follows that Congress can acquiesce in and adopt a judicial interpretation of a jurisdictional statute that also hinges on state law. Therefore, the fact that the scope of the probate exception to federal subject-matter jurisdiction turns in part on a State's particular probate laws does not violate the Supremacy Clause.

III. Sound Considerations of Federalism, Finality, and Judicial Economy Support the Deference to State Law Embodied in the Probate Exception.

Using state law as a reference point to define the scope of the probate exception also advances important policy objectives that are unique to the probate process. These goals include: (1) preserving the integrity of state probate systems; (2) deferring to the expertise of state probate courts and judges; and (3) promoting judicial economy in handling probate-related matters. *See Storm v. Storm*, 328 F.3d 941, 944 (CA7 2003).

As the Court has observed, States have an "interest in facilitating the administration and expeditious closing of estates." *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 479-80 (1988). To that end, States also have an interest in "managing *all* challenges addressing an estate res located in that state or with which the state has some meaningful connection." *Golden v. Golden*, 382 F.3d 348, 359 (CA3 2004). Thus, when a State requires that a particular challenge be prosecuted in a probate

proceeding or in a probate court, it has made a policy judgment that adjudication of such a claim within the probate process is necessary to the effective disposition of the estate. *Cf. id.* (noting that, when a State classifies a probate-related claim as an independent action *inter partes* that may be pursued in general-jurisdiction courts, it "has presumably determined as a matter of law that such actions will not disrupt the activities of the state probate courts").[3]

The probate exception reflects respect for these policy judgments by engrafting the States' classifications of probate-related claims into the boundary of federal jurisdiction. In this manner, the exception preserves the integrity of state probate systems by ensuring that litigants may not file collateral proceedings in federal court to pursue claims that the State has deemed integral to the probate process—such as occurred in this case. *See Harris*, 317 U.S., at 452 ("The law of the State demands the speedy settlement of the estate. If independently of that law the administrator may apply under [the Bankruptcy Act], it may well happen that this state policy will be nullified."); *Moore v. Graybeal*, 843 F.2d 706, 710 (CA3 1988) (rejecting federal jurisdiction over claim under probate exception because "the proposed action is so inconsistent with the Delaware statutory plan for exclusive review of probate proceedings that allowing it would subvert the probate law").

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3. In this sense, probate proceedings should not be viewed as "pitting the individual against the state," thereby justifying the availability of a federal forum as necessary to protect individual rights. *See* DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE 100 (1995). Rather, probate presents "a conflict of individual or group interests" in which "the state may be seen as the defender of one set of private interests against another"—specifically, the interest of a State's citizens in having their testamentary intentions properly effectuated against those who would subvert those intentions through collateral litigation. *See id.*

In addition, "[b]ecause state courts have nearly exclusive jurisdiction over probate matters, state judges vested with probate jurisdiction develop a greater familiarity with such legal issues." *Storm*, 328 F.3d, at 944; *see also Bassler v. Arrowood*, 500 F.2d 138, 142 (CA8 1974) ("The area of probate and decedents' estates presents many varied problems. State courts deal with these problems daily and have developed an expertise which should discourage federal court intervention."). Indeed, in many States this expertise is particularly concentrated because the States have established specialized probate courts throughout the State, or at least in certain regions of the State.[4] And even in those States

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4. ALA. CONST. art. VI, §144 (establishing probate courts in each county); COLO. CONST. art. VI, §1 (establishing probate court in City and County of Denver); CONN. GEN. STAT. §§45a-3 to -6i (establishing probate courts in districts throughout State); D.C. CODE §11-902 (establishing probate division within Superior Court of District of Columbia); GA. CONST. art. VI, §1, ¶VI (establishing probate courts in each county); IND. CODE §33-31-1-1 (establishing probate court in St. Joseph County); ME. CONST. art. VI, §6 (establishing probate courts in each county); MD. CONST. art. IV, §40 (establishing orphans' courts in all but two counties); MASS. GEN. LAWS ch. 211B, §1 (establishing probate department within state trial courts); MICH. CONST. art. VI, §15 (establishing probate courts in each county); MINN. STAT. §487.01 (establishing separate probate courts in Hennepin and Ramsey Counties); MO. REV. STAT. §472.020 (establishing probate division in state circuit courts); N.H. REV. STAT. ANN. §547:1 (establishing probate courts); N.J. STAT. ANN. §2B-14:1 (establishing surrogate's courts in each county); N.M. CONST. art. VI, §23 (establishing probate courts in each county); MCKINNEY'S CONST. art. VI, §12 (establishing surrogate's courts in each county in New York); OHIO CONST. art. IV, §4(C) (establishing probate division in Court of Common Pleas); OHIO REV. CODE ANN. §2101.46 (re-establishing probate courts in certain counties); 20 PA. CONS. STAT. §701 (establishing orphan's court divisions in court of common pleas); R.I. GEN. LAWS §8-9-4 (establishing probate courts on a town-by-town

without statutorily-created probate courts, many general-jurisdiction courts have assigned probate matters to specialized probate divisions or judges within those courts by local rule.[5] The probate exception properly defers to this expertise by examining whether state law assigns a matter to a specialized court. *See Dragan v. Miller*, 679 F.2d 712, 715 (CA7 1982) (commenting that "[i]f a state creates a specialized cadre of judges to administer its probate jurisdiction, this will be a reason for interpreting the probate exception to the federal diversity jurisdiction broadly in that state"); *Bassler*, 500 F.2d, at 142 (concluding that "[t]hese local problems should be decided by state courts").

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basis); S.C. CODE ANN. §14-1-70 (establishing probate courts statewide); 1870 Tenn. Pub. Acts 135 (creating probate court in Shelby County); TEX. GOV'T CODE §§25.0173, 25.0453, 25.0595, 25.0632, 25.0733, 25.0862, 25.1034, 25.1103, 25.2224, 25.2293 (establishing probate courts in certain counties); VT. STAT. ANN. tit. 4, §§271-277 (establishing probate courts in districts throughout State).

5. Special probate divisions or judge assignments have been created by courts in Arizona, California, Florida, Indiana, Illinois, Iowa, Kansas, Nevada, and Tennessee. *See, e.g.*, SUPER. CT. LOC. R.— MARICOPA COUNTY R. 5 (Ariz.) (establishing Probate/Mental Health Department of Court); SUPER. CT. LOC. R.—LOS ANGELES COUNTY R. 2.2 (Cal.) (establishing Probate Division); 11TH JUD. CIR. LOC. R. R-1-9 (Fla.) (same); CIR. CT. COOK COUNTY LOC. R. 12.1 (Ill.) (same); MARION SUPER. CT. ADMIN. R. art. IV.A (Ind.) (same); IOWA CT. R. 22.7 (providing for assignment of probate cases to associate probate judges); 7TH JUD. DIST. CT. R. 1.F.5 (Kan.) (providing for assignment of probate cases to specific court division); 8TH JUD. DIST. CT. R. 4.10 (Nev.) (providing for assignments to probate judges); KNOX COUNTY CH. CT. R. 17 (Tenn.) (providing for Probate Division of Chancery Court); *see also* COMMISSION ON NATIONAL PROBATE COURT STANDARDS, NATIONAL PROBATE COURT STANDARDS 5-6 (1993) (discussing creation of probate departments and judge assignments by local rule).

Finally, by respecting a State's decision to consolidate related probate matters in a special court or a single proceeding, the probate exception fosters efficiency and judicial economy. "The process of determining and effectuating a decedent's testamentary wishes will generally begin in a state court." *Storm*, 328 F.3d, at 944. Because this process may implicate the interests of multiple, competing claimants, a State may reasonably prefer that collateral matters involving these interests also be resolved in the probate proceeding rather than some other forum. *See* WILLIAM M. MCGOVERN & SHELDON F. KURTZ, PRINCIPLES OF WILLS, TRUSTS & ESTATES 276 (Thomson/West 2005) ("[W]ills often affect many persons and so might give rise to many lawsuits between heirs and devisees, whereas a single probate proceeding binds them all."). By giving due consideration to this legitimate state preference, the probate exception "serves to preserve the resources of both the federal and state judicial systems and avoids the piecemeal or haphazard resolution of all matters surrounding the disposition of the decedent's wishes." *Storm*, 328 F.3d, at 944; *see also Dragan*, 679 F.2d, at 714 ("If the probate proceeding thus must begin in state court, the interest in judicial economy argues for keeping it there until it is concluded.").[6]

CONCLUSION

The Court should affirm the judgment of the court of appeals.

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6. To be sure, competing policy considerations may be implicated in certain cases in which the United States is a party, such as disputes regarding federal tax liability. But as the United States implicitly acknowledges, *see* U.S. Br., at 23-24, application of the probate exception in such circumstances is not a question presented in this case, and the Court need not reach that issue to affirm the judgment of the court of appeals.

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No. 04-1544

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-IN THE

Supreme Court of the United States

VICKIE LYNN MARSHALL,
Petitioner,

v.

E. PIERCE MARSHALL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF *AMICUS CURIAE* WASHINGTON LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTION ADDRESSED BY *AMICUS CURIAE*

The question addressed by *amicus curiae* is:

Whether a bankruptcy court lacks jurisdiction in a civil proceeding where the subject matter of the action falls within the exclusive *in rem* jurisdiction of a probate or other state court.

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BRIEF OF *AMICUS CURIAE* WASHINGTON LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

Amicus curiae Washington Legal Foundation ("WLF") respectfully submits that the judgment of the court of appeals should be affirmed.[1]

INTEREST OF *AMICUS CURIAE*

WLF is a nonprofit public interest law and policy center based in Washington, D.C., with thousands of supporters nationwide. WLF regularly appears before federal and state courts to promote economic liberty, free enterprise, and a limited and accountable government. WLF has filed briefs in this Court and elsewhere addressing the limitations upon the scope of jurisdiction to be exercised by federal and state courts. *See, e.g., Lincoln Property Co. v. Roche,* 126 S. Ct. 606 (2005); *American Home Products Corp. v. Collins, cert. denied,* 125 S. Ct. 1823 (2005).

WLF fully supports the position of E. Pierce Marshall ("Respondent") that this Court should affirm the Ninth Circuit's judgment and hold that, under the probate exception, the federal district court lacked jurisdiction to hear this case. WLF writes separately to address the broader implications of the challenge by Vickie Lynn Marshall ("Petitioner") to the probate exception; specifically, the negative impact upon the orderly and effective administration of justice in the exercise by both federal and state courts of *in rem* jurisdiction. The touchstone of *in rem* jurisdiction, and its effective exercise, is the *exclusive* jurisdiction granted to one court over the *res*,

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[1] Pursuant to this Court's Rule 37.6, WLF states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than WLF or its counsel, contributed monetarily to the preparation or submission of this brief. Letters consenting to the filing of this brief have been submitted to the Clerk.

without interference by other courts. The unduly restrictive reading of the probate exception advanced by Petitioner contradicts nearly two centuries of judicial precedent that were designed to avoid "unseemly and disastrous conflicts" between federal and state courts of the kind that have unfortunately occurred in this case.

STATEMENT OF THE CASE

Petitioner married J. Howard Marshall II ("Decedent") in 1994. Decedent died in 1995. ER[2] 95. Prior to his death, Decedent conveyed and transferred most of his property to a living trust established under a written trust instrument. ER 1018, 2623. He also left a series of wills, the last of which (the "Will") left all of his property to the Trust to be distributed after his death in accordance with the terms of the Trust. ER 510, 514-16. (The Will and Trust are collectively referred to as the "Estate Plan").

Prior to Decedent's death, Petitioner commenced proceedings in the probate court for the state of Texas, seeking a declaration concerning the Trust's validity and alleging that Respondent tortiously interfered with her property rights with respect to Decedent's assets. ER 4615-17, 5620. After Decedent died, Petitioner filed a further application seeking a declaration that Decedent died intestate. ER 816-18. Respondent opposed the application and sought to admit the Will in the Texas probate court. ER 836-45. Petitioner thereafter contested the Will, challenged the validity of the Estate Plan, and pursued her claim against Respondent – all in the Texas probate court proceeding that she commenced. ER 1319-31, 2863-65, 5523-31. A five month jury trial took place in 2000 and 2001, ER 4706, and on March 7, 2001, the jury returned its verdict upholding the validity of the Trust

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2 The term "ER" refers to certain "excerpts of record" filed in the Ninth Circuit pursuant to that Court's local rules.

and Will and rejecting the various claims seeking recoveries at odds with Decedent's Estate Plan. ER 3719, 3735. An initial probate judgment was entered by the Texas probate court on August 15, 2001, ER 4001, and the second amended final probate judgment was entered on December 7, 2001, which admitted the Will to probate, and found both the Will and the Trust to be genuine and valid and not the product of improper conduct. ER 4717.

In January 1996, while the Texas probate proceeding was pending, Petitioner filed a voluntary bankruptcy petition in California. ER 2642. Five months after filing for bankruptcy, she commenced a civil proceeding against Respondent in bankruptcy court. ER 948-49. The new lawsuit involved the same subject matter as the controversies to be determined by the Texas probate court, requiring consideration of issues such as the Decedent's intent concerning disposition of his assets and the validity of the Estate Plan. Compare ER 948-49 with ER 2863-65. The bankruptcy court ultimately issued a decision finding that Petitioner had an expectancy of a substantial portion of Decedent's wealth, and after concluding that Respondent interfered with that expectancy, awarded approximately $450 million to the Petitioner. App.[3] 198-99.

Respondent appealed to the federal district court. App. 148-99. There, the court concluded that the civil proceeding was non-core, and therefore reviewed *de novo* the bankruptcy court's decision. App. 171-87. The district court ultimately awarded Petitioner about $88.5 million, concluding that Decedent's signature on the Trust was falsified, that the Estate Plan did not reflect Decedent's true intentions, and that Respondent had interfered with Decedent's intent to give Petitioner an alleged gift by engaging in illegitimate "estate

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[3] "App." refers to the Appendix to Petition for Writ of Certiorari.

planning transactions for [Decedent]." ER 65, 73; App. 78-136, 194-46.

Upon further appeal, the Ninth Circuit vacated the district court's judgment, finding that the "probate exception" applies in bankruptcy cases. App. 1-38. The Ninth Circuit based its ruling in part on the exclusive *in rem* jurisdiction of probate courts that has a binding effect "upon the whole world," including United States district courts, of determinations made by the probate court. Because Petitioner's claim that Decedent intended to give her a gift "went to the very essence of the testamentary instruments executed by J. Howard Marshall II in his lifetime," App. 35, the Ninth Circuit found her claims to be "'in substance nothing more than a thinly veiled will contest" and a "disguised attack" on the Trust and the disposition of the property under the Trust. App. 31, 36-37.

Petitioner filed a petition for a writ of *certiorari* to the Ninth Circuit, which this Court granted. *Marshall v. Marshall*, 126 S. Ct. 35 (2005).

SUMMARY OF ARGUMENT

In *The Elegant Universe*, author Brian Greene describes the quest by physicists for more than half a century to formulate a unified theory of physics, known as "string theory," that reconciles the apparent conflict between the theories of general relativity and quantum mechanics. Brian Greene, *The Elegant Universe* 15 (1999).

In the universe of law where courts exercise *in rem* jurisdiction, there already exists such a unified theory. The fundamental principles of that "theory" have been developed by the Court over two centuries, and include the following:

First, the exercise by a court of *in rem* jurisdiction is always exclusive. This reflects the need to promote harmonious cooperation among courts and "[t]o avoid unseemly and disastrous conflicts in the administration of our dual judicial

system." *Penn General Casualty Co. v. Commonwealth of Pennsylvania ex rel. Schnader*, 294 U.S 189, 195 (1935).

Second, in order to resolve potential conflicts among courts seeking to exercise *in rem* jurisdiction, this Court has developed the doctrine of "prior exclusive jurisdiction." That doctrine imposes a prudential limitation on the jurisdiction of courts in proceedings where another court has previously exercised *in rem* jurisdiction over the *res*. *United States v. Bank of New York & Trust Co.*, 296 U.S. 463, 478 (1936); *United States v. One 1985 Cadillac Seville*, 866 F.2d 1142, 1145 (9th Cir. 1989)(citing *Penn General Casualty*, 294 U.S. at 195).

Third, because of the nature of *in rem* proceedings as "one against the world," the limitation on the jurisdiction of other courts, whether exercised *in rem* or *in personam*, applies to all disputes that "come incidentally in controversy" with the "same subject matter" as that adjudicated in the *in rem* proceeding. *Gelston v. Hoyt*, 16 U.S. (3 Wheat.) 246, 315 (1818). Such relief is necessary to avoid "collateral" and "indirect" attacks on the exclusive exercise of *in rem* jurisdiction. *Id.* at 313.

This Court recognized more than a century ago that the "continued prevalence" of the probate exception can be attributed to the nature of probate actions as *in rem* proceedings. *Case of Broderick's Will*, 88 U.S. (21 Wall.) 503, 509 (1874). A probate action is, however, but one of many kinds of proceedings that are based upon the principles of *in rem* jurisdiction. Accordingly, the Petitioner's efforts to limit the application of the probate exception, if successful, would have negative implications for all federal and state courts that depend upon their *in rem* jurisdiction to grant relief that is effective "against the world."

The Court anticipated this very peril when it warned in *Gelston v. Hoyt*, nearly two centuries ago, about the "mischievous consequences" that would result if decisions by courts with exclusive *in rem* jurisdiction were subject to "in-

direct" or "collateral" attack. *Id.* at 313. In *Gelston*, the Court held that a state court lacked jurisdiction to hear defenses to a tort action where such defenses were premised on adjudication of questions related to forfeiture and seizure that were subject to the exclusive *in rem* jurisdiction of the federal admiralty court. *Id.* at 313-14. The same reasoning applies to this case – namely, the federal district court lacks jurisdiction to hear a civil proceeding involving subject matter that falls within the exclusive *in rem* jurisdiction of the Texas probate court.

The United States, as *amicus curiae* supporting the Petitioner, has raised concerns that the Ninth Circuit's decision, if affirmed, will deprive federal courts of jurisdiction to determine such matters as the tax liability of a decedent's estate. That concern is wholly misplaced. The exclusive *in rem* jurisdiction vested in probate courts does not equate to the wholesale elimination of the concurrent *in personam* jurisdiction of federal courts "to establish a debt or a right to share in property, and thus to obtain an adjudication which might be had without disturbing the control of the state court." *United States v. Bank of New York & Trust Co.*, 296 U.S. at 478; *see also Waterman v. Canal-Louisiana Bank & Trust Co.*, 215 U.S. 33, 44 (1909). It does, however, prevent federal courts from interfering with state probate actions, whether directly by contesting probate of a will or indirectly in the manner pursued by Petitioner.

As for the concern of the United States Trustee Program (the "Program") that recognition of a "broad probate exception" could interfere with the ability of bankruptcy courts to administer debtors' estates expeditiously, the Program has it backwards. As a practical matter, restrictions on the effective exercise of *in rem* jurisdiction by courts, if generally applied in bankruptcy and other *in rem* proceedings, would have a more widespread and deleterious impact on the bankruptcy system than would application of the probate exception in the fewer number of cases where the jurisdiction of probate courts and bankruptcy courts intersect.

ARGUMENT

I. ALL COURTS THAT EXERCISE *IN REM* JURISDICTION DO SO EXCLUSIVELY

As this Court has recognized for nearly two centuries, probate proceedings are actions *in rem*. *E.g.*, *Gelston v. Hoyt*, 16 U.S. at 315; *Case of Broderick's Will*, 88 U.S. at 509.[4] Indeed, the "continued prevalence" of the probate exception has been attributed by this Court to the manner in which the probate of a deceased person's estate "partakes, in some degree, of the nature of a proceeding *in rem*." *Broderick's Will*, 88 U.S. at 509. Accordingly, the general principles of law governing *in rem* jurisdiction apply to probate matters.

Both federal and state courts exercising *in rem* jurisdiction are granted exclusive jurisdiction over the *res* to be administered.[5] This rule has been regularly applied in jurisdictional disputes between federal and state courts involving property that has been seized or attached, where this Court has consistently held that property cannot be subject to two jurisdictions. *Covell v. Heyman*, 111 U.S. 176, 181-82 (1884). In *Covell v. Heyman*, the Court explained the effect of one court's jurisdiction over the property upon the jurisdiction of the other:

> [W]hen one takes into its jurisdiction a specific thing, that *res* is as much withdrawn from the judicial power of the other as if it had

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4 Probate proceedings under Texas law are no exception to this rule. *E.g.*, *Mooney v. Harlin*, 622 S.W.2d 83, 85 (Tex. 1981).

5 *See* TEX. PROB. CODE ANN. §§ 5A(b), 5(F)("Any cause of action appertaining to estates or incident to an estate shall be brought in a statutory probate court" rather than in the district court, including "All matters relating to the collection, settlement, partition and distribution of estates of deceased persons").

> been carried physically into a different territorial sovereignty. To attempt to seize it by a foreign process is futile and void.

Id. at 182.

The exclusive *in rem* jurisdiction of courts "is a principle of comity with perhaps no higher sanction . . ." *Id.* This Court has long recognized that "[a] most injurious conflict of jurisdiction would be likely often to arise between the federal and state courts if the final process of the one could be levied on property which had been taken by the process of the other." *Hagan v. Lucas*, 35 U.S. (10 Pet.) 400, 403 (1836). More recently, in *Penn General Casualty*, 294 U.S 189, this Court reaffirmed that where two suits before a federal and state court are *in rem* or *quasi in rem*, "the jurisdiction of one court must of necessity yield to that of the other" in order "[t]o avoid unseemly and disastrous conflicts in the administration of our dual judicial system." *Id.* at 195.

II. THE DOCTRINE OF PRIOR EXCLUSIVE JURISDICTION APPLIES TO ALL *IN REM* AND *QUASI IN REM* PROCEEDINGS

A. The Doctrine of Prior Exclusive Jurisdiction Promotes Harmonious Cooperation Among Federal and State Courts

The need to avoid conflicts and promote harmonious cooperation between federal and state courts led to the development by this Court of the doctrine of "prior exclusive jurisdiction." Under this principle, applicable to both federal and state courts, "the court first assuming jurisdiction over the property may maintain and exercise that jurisdiction *to the exclusion of the other. . . .*" *United States v. Bank of New York & Trust Co.*, 296 U.S. at 477 (emphasis added). The doctrine reflects "the discharge of the long-recognized duty of this court to give effect to such 'methods of procedure as shall serve to conciliate the distinct and independent tribunals of the States and of the Union, so that they may co-operate as

harmonious members of a judicial system coextensive with the United States.'" *Id.* at 477-78 (quoting *Taylor v. Carryl*, 61 U.S. (20 How.) 583, 595 (1858)).[6]

The doctrine of prior exclusive jurisdiction has never been restricted to cases where property has been seized under judicial process, but rather "applies as well where suits are brought to marshal assets, administer trusts, or liquidate estates, and in suits of similar nature, where, to give effect to its jurisdiction, the court must control the property." *Id.* at 477. In *Princess Lida of Thurn and Taxis v. Thompson*, 305 U.S. 456 (1939), for example, the doctrine was applied in a dispute specifically involving a trust. The trustees had filed an account of the trust in the Court of Common Pleas for Pennsylvania. Certain of the beneficiaries brought suit in equity in federal district court against the trustees, alleging mismanagement of the trust and seeking removal of the trustees and an accounting and repayment of the estate's losses. The trustees sought to enjoin the beneficiaries from continuing the federal lawsuit. Concluding that the Common Pleas Court "could not *effectively exercise the jurisdiction vested in it*, without a substantial measure of control of the trust funds," this Court held that the jurisdiction of the Common Pleas Court was *quasi in rem* and thus exclusive, and that the federal district court was without jurisdiction of the suit brought before it. *Id.* at 467 (emphasis added).

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6 The doctrine has been explained as one that is not a constitutional limitation upon the jurisdiction of federal courts, but rather "a prudential limitation applied by the Supreme Court in the interest of judicial harmony." *United States v. One 1985 Cadillac Seville*, 866 F.2d 1142, 1145 (9th Cir. 1989). Although a prudential limitation, the Ninth Circuit has held that, under this Court's well established precedent, a federal court lacks discretion to accept jurisdiction and "must yield to a prior state proceeding." *Id.* (citing *Penn General Casualty Co.*, 294 U.S. at 195).

B. Neither 28 U.S.C. § 1334 Nor the Bankruptcy Code Abrogate the Doctrine of Prior Exclusive Jurisdiction As It Applies to *In Rem* State Court Proceedings Involving Non-Debtor Assets

Petitioner suggests in her brief that Congress, when it enacted 28 U.S.C. § 1334 in 1978, as amended in 1984, intended to overrule the doctrine of prior exclusive jurisdiction and confer federal district courts with jurisdiction over property subject to pre-existing *in rem* proceedings. That reading of section 1334 finds no support in the statute's plain language, or elsewhere.

Petitioner incorrectly relies upon section 1334(b), which provides:

> Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

28 U.S.C. § 1334(b). Notably, subsection (b) refers to "any *Act of Congress* that confers exclusive jurisdiction" but makes no mention of "state law" that confers exclusive jurisdiction. *Id.* (emphasis added). Given the use of the phrase "state law" elsewhere in section 1334 (specifically, subsection (c)), the absence of any reference to "state law" in section 1334(b), when coupled with the explicit reference to "any Act of Congress," is telling. If anything, it indicates a deliberate intention *not* to provide district courts with original jurisdiction over proceedings otherwise subject to the exclusive *in rem* jurisdiction of state courts. *E.g.*, *Patterson v. Shumate*, 504 U.S. 753, 758 (1992)(when Congress meant to refer to state law under the Bankruptcy Code, it used the term "state law").

Nor does subsection (e) of section 1334 support Petitioner's argument. Section 1334(e) grants the district court exclusive jurisdiction over "all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate." 28 U.S.C. § 1334(e). However, the case at issue does *not* involve the district court's exercise of jurisdiction over the *res* of the *Petitioner*. Here, the Petitioner confuses the *in rem* and *in personam* jurisdiction granted to federal courts in bankruptcy cases. The civil action in which Petitioner has brought her claims against Respondent is not an *in rem* proceeding as it relates to her bankruptcy proceeding, but rather a chose in action in which the district court purported to exercise *in personam* jurisdiction over Respondent. Merely because her personal claims (to the extent they exist) may be property of the estate does not convert the civil proceeding against Respondent into one that is *in rem*.[7] The only *res* in dispute is Decedent's probate estate, and Petitioner's claim that she was entitled to receive that property upon Decedent's death. Those are matters subject to the exclusive *in rem* jurisdiction of the Texas probate court.

Given that the *res* in dispute is *not* the property of the debtor or the estate, section 543 of the Bankruptcy Code would not apply. That provision appears to constitute the only statutory exception under the Bankruptcy Code to the doctrine of *prior* exclusive jurisdiction. Section 543 requires

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[7] Indeed, if a debtor's ownership of a chose in action was itself sufficient to create exclusive in *rem* jurisdiction over civil proceedings brought to pursue those claims, then bankruptcy courts would have exclusive jurisdiction over every one of those civil proceedings. One need look no further than the plain language of section 1334(b), which provides that such jurisdiction is "original *but not exclusive*," to reject that premise. 28 U.S.C. § 1334(b)(emphasis added); *see Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 7 (2000)(requiring that statute be interpreted based upon its plain language).

a "custodian" of property of the debtor or the estate not to take action with respect to such property and to turn it over to the bankruptcy trustee. 11 U.S.C. § 543. The term "custodian" is defined under section 101(11) of the Bankruptcy Code to include state court receivers, trustee or assignees under a general assignment for the benefit of creditors. 11 U.S.C. § 101(11). The legislative history to section 101(11) explains that custodian is defined to mean a "prepetition liquidator of the *debtor's* property," or other court officers that perform functions "substantially similar to those of a receiver or trustee." H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 310 (1977)(emphasis added), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6267. The proceeding before the Texas probate court obviously does not fall within the scope of section 543, as it involved administration of the *Decedent's* property (not the debtor's) and has no "custodian" within the meaning of section 101(11).

Other than section 543, which affects only the *priority* of exclusive jurisdiction and in any event is not applicable to this case, there is no indication in the language of section 1334, the Bankruptcy Code, or elsewhere that Congress sought to depart from the doctrine of prior exclusive jurisdiction. In other cases, this Court has presumed that Congress continued "'past bankruptcy practice absent a clear indication that Congress intended . . . a departure . . . .'" *Cohen v. De La Cruz*, 523 U.S. 213, 221 (1998)(quoting *Pennsylvania Pub. Welfare Dep't v. Davenport*, 495 U.S. 552, 563 (1990)). As noted above, the doctrine of prior exclusive jurisdiction has been applied for more than a century and has been recognized by this Court as "a principle of comity with perhaps no higher sanction." *Covell v. Heyman*, 111 U.S. at 182. Thus, one would expect something more explicit from Congress (comparable to Section 543) if it intended to deviate from those principles in any respect.

Indeed, the underpinning of that doctrine, *i.e.*, that prior possession of the *res* determines whether a court's jurisdiction lies, was reinforced in a recent case involving the exer-

cise of *in rem* jurisdiction. In *California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998), the Court held that the Eleventh Amendment did not preclude the federal court from exercising its exclusive *in rem* admiralty jurisdiction to adjudicate the State of California's claim to a shipwreck. *Id.* at 507-08; 28 U.S.C. § 1333 (granting federal courts jurisdiction exclusive of states over admiralty cases). But the Court expressly based its ruling on the fact that the State of California did *not* have possession of the *res*, and distinguished other prior opinions of this Court on that very basis. *Id.* at 504 ("[i]n this case, unlike in *Treasure Salvors*, DSR asserts rights to a *res* that is not in the possession of the State"). The fact that the Court's decision turned on the state's non-possession of the *res* suggests that the doctrine of prior exclusive jurisdiction retains its vitality even where Congress has otherwise granted, by statute, exclusive *in rem* jurisdiction to a federal court.

Petitioner cites to three cases where she contends courts have, since enactment of section 1334, rejected the doctrine of prior exclusive jurisdiction and permitted federal courts to exercise jurisdiction notwithstanding prior "*in rem*" proceedings. *White v. White (In re White)*, 851 F.2d 170, 172-74 (6th Cir. 1988)(prior divorce proceeding); *Slay Warehousing Co., Inc. v. Modern Boats, Inc. (In re Modern Boats)*, 775 F.2d 619, 620 (5th Cir. 1985)(prior admiralty proceeding); *In re French*, 139 B.R. 476, 482 (Bankr. D.S.D. 1992)(prior divorce proceeding). Each of those cases are inapposite. Two of them involved prior divorce proceedings, which have been found by this Court *not* to constitute *in rem* proceedings to which the world is a party. *E.g.*, *Williams v. State of North Carolina*, 317 U.S. 287, 297 (1942)(citing *Haddock v. Haddock*, 201 U.S. 562 (1906)) ("[t]he historical view that a proceeding for a divorce was a proceeding *in rem* [citation omitted] was rejected by the *Haddock* case"); *Williams v. State of North Carolina*, 325 U.S. 226, 232 (1945)("insofar as a divorce decree partakes of some of the characteristics of a decree *in rem*, it is misleading to say that all the world is party

to a proceeding *in rem*").[8] The third case, *Modern Boats*, 775 F.2d at 610, involved a prior federal admiralty proceeding which, under the plain language of section 1334(b) granting original jurisdiction "notwithstanding any Act of Congress," does not preclude the exercise of original federal jurisdiction by the district court.

Finally, Petitioner points to Rule 1016 of the Federal Rules of Bankruptcy Procedure, under which the death of a debtor "shall not abate a liquidation case under chapter 7 of the Code." FED. R. BANKR. P. 1016. Of course, that rule is entirely in accord with the doctrine of prior exclusive jurisdiction. Where a debtor files for bankruptcy protection and then subsequently dies, the federal district court has prior (and thus exclusive) jurisdiction over the *res*, *i.e.*, the property of the debtor's estate.

Accordingly, the doctrine of prior exclusive jurisdiction remains applicable state probate proceedings, and has not been abrogated either by section 1334 or the enactment of the Bankruptcy Code. Resolution of the appeal thus turns on the scope and effect of the Texas probate court's exclusive *in rem* jurisdiction, addressed *infra*.

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[8] Indeed, the fact that divorce proceedings are not *in rem* distinguishes this case from *Ankerbrandt v. Richards*, 504 U.S. 689 (1992), upon which Petitioner heavily relies.

III. THE SCOPE AND EFFECT OF A PROBATE COURT'S EXCLUSIVE *IN REM* JURISDICTION MUST BE EXPANSIVE ENOUGH TO GRANT EFFECTIVE RELIEF "AGAINST THE WORLD"

A. A Court's Exclusive *In Rem* Jurisdiction Is Not Limited Solely to Disposition of the Property

An *in rem* proceeding is "one against the world," enabling a court with jurisdiction over the *res* to "determine all claims that anyone, whether named in the action or not, has to the property or thing in question." *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 448 (2004). In one of the earlier cases applying the "probate exception," this Court has described the nature of a proceeding *in rem* as one "in which all persons in the world who have any interest are deemed parties, and are concluded as upon *res judicata* by the decision of the court having jurisdiction." *Broderick's Will*, 88 U.S. at 509.

By its very nature, the relief available under an *in rem* proceeding is not narrowly limited to disposition of the *res*. In order to grant relief "against the world," the court must be able to "effectively exercise the jurisdiction vested in it." *Princess Lida of Thurn and Taxis v. Thompson*, 305 U.S. at 466-67. In *Princess Lida*, for example, the Court held that, where a state court was vested with exclusive *quasi in rem* jurisdiction over a trust, the federal district court lacked jurisdiction over an action charging the trustees with mismanagement of the trust estate and seeking, as a remedy, to remove the trustees, require them to file an account of the trust and post a bond. *Id.* at 467-68.

Likewise, in *Gardner v. New Jersey*, 329 U.S. 565 (1947), the Court held that if the reorganization court lacked the power to deal with tax liens of a state, "the assertion by the State of a lien would pull out chunks of an estate from the reorganization court and transfer a part of the struggle over the corpus into tax bureaus and other state tribunals." *Id.* at

577. That result would "fly in the teeth" of the exclusive jurisdiction granted to the reorganization court. *Id.* This Court explained that exclusive jurisdiction over the debtor and its property:

> is not limited to the prevention of interference with the use of the property by the trustee; it "extends also to the adjudication of questions respecting the title." [Citations omitted]. It is the exclusive jurisdiction of the reorganization court which gives it power to preserve the railway as a unit and as a going concern and to prevent it from being divided up and dismembered piece-meal.

Id.[9]

The scope and effect of a court's exclusive *in rem* jurisdiction can apply to an *in personam* action before another court. For example, this Court held in *Hood* that a discharge of a debt by a bankruptcy court, although an *in rem* proceeding, "'operates as an injunction' against creditors who commence or continue an action against the debtor *in personam* to recover or to collect a discharged debt . . . ." *Hood*, 541 U.S. at 447, 448 n.4. That injunction over *in personam* actions is necessary for a bankruptcy court exercising *in rem* jurisdiction to administer the *res* effectively, without interference by other courts.

Even when faced with constitutional challenges to a court's exclusive *in rem* jurisdiction, this Court has consistently confirmed the expansive authority of such courts to grant "relief against the world." Most recently in *Hood*, this

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[9] To be clear, unlike in *Gardner*, the dispute between Petitioner and Respondent in this case is not over the title of any property of the *debtor's* estate, but rather goes to the entitlement of the parties to the *res* of *Decedent's* estate.

Court concluded that the bankruptcy court's *in rem* jurisdiction was binding on the State of Tennessee, even where there was no waiver of the state's sovereign immunity under the Eleventh Amendment. *Id.* at 448 ("[u]nder our longstanding precedent, States, whether or not they choose to participate in the proceeding, are bound by a bankruptcy court's discharge order no less than other creditors"); *see also California v. Deep Sea Research, Inc.*, 523 U.S. at 507-08 (Eleventh Amendment held not to bar federal *in rem* jurisdiction over claims of California to a shipwreck, at least where the *res* was not in the State's possession).

Similarly, in *Broderick's Will*, this Court explained that *in rem* jurisdiction is binding even upon parties that (in what would otherwise violate due process) never received notice of the proceeding:

> The world must move on, and those who claim an interest in persons or things must be charged with knowledge of their status and condition, and of the vicissitudes to which they are subject. This is the foundation of all judicial proceedings *in rem*.

Broderick's Will, 88 U.S. at 519.

Given that the exclusive jurisdiction of *in rem* proceedings applies to states with Eleventh Amendment sovereign immunity and parties without any notice of the proceeding, there seems no basis to except from that expansive reach an individual such as the Petitioner who is neither a sovereign nor unaware of (and who in fact commenced and was a party to) the pending probate proceeding.

Petitioner relies upon *Waterman v. Canal-Louisiana Bank & Trust Co.*, 215 U.S. 33 (1909), but that decision actually supports the Respondent. In *Waterman*, the complainant, a niece of the decedent, sought an accounting in federal court of a probate estate, and also sought to cause the executor to recognize her legacy under the will and pay the residue

of the estate over to her. *Id.* at 42. With respect to her request for an accounting of the probate estate, the Court held that the federal district court lacked jurisdiction to hear that request, concluding that such relief would interfere with the probate court's jurisdiction to "determin[e] the amount of the residue arising from the settlement of the estate in the court of probate." *Id.* at 46. The Court did find that the federal court had jurisdiction to establish complainant's interest in her legacy and her right to recover from any residue of the estate not previously distributed. It did so, however, only after explicitly noting that the complainant "does not seek to set aside the probate of the will, which the bill alleges was *duly established and admitted to probate in the proper court of the state.*" *Id.* at 46 (emphasis added). Given the absence of any direct or indirect challenge to the will, or whether its terms reflected the decedent's testamentary interest, and "because of the facts presented in the bill," the Court held that the federal district court's exercise of jurisdiction in that limited circumstance would not interfere with the "ordinary settlement of the estate" or the possession of the estate in the hands of the executor. *Id.* Even so, the Court made clear that the federal district court lacked jurisdiction to determine the *amount* of the residue arising from the settlement of the estate in the court of probate, leaving that determination to the exclusive jurisdiction of the state probate court. *Id.*

Thus, the limited claim which the Court allowed the complainant in *Waterman* to adjudicate in federal court did not interfere with the probate court's ability to grant effective *in rem* relief "against the world." In contrast, Petitioner's claims against Respondent, which are premised on the assertion that Decedent intended to grant a portion of his estate to Petitioner, indisputably interfere with the Texas probate court's exercise of its jurisdiction.

B. In *Gelston v. Hoyt*, this Court Answered the Question Presented On Appeal In This Case

Petitioner urges an unduly narrow view of *in rem* jurisdiction that ignores well settled precedent of this Court. The very question concerning the extent to which a court's exclusive *in rem* jurisdiction deprives another court of jurisdiction over the subject matter of the *in rem* proceeding was specifically addressed in an opinion written by Justice Story nearly 200 years ago, *Gelston v. Hoyt*, 16 U.S. 246.

In *Gelston*, the petitioners, acting under color of United States law, seized a ship from the respondent. Because the seizure for the forfeiture was under United States law, the federal district court had exclusive *in rem* jurisdiction to determine whether the seizure was "rightful or tortious." *Id.* at 312. The district court ruled in favor of the respondent, finding the seizure to have been unjustified and ordered the ship returned. The respondent then brought suit for trespass and conversion against the petitioners in the state court of New York. In defense against the action, the petitioners sought to offer, as justification for the trespass or in mitigation of damages, evidence to prove their right of seizure. The state court refused to consider that evidence and entered judgment in favor of the respondent; the supreme court of the state of New York affirmed.

In affirming the judgment of the state court, and finding that the state court could not "entertain and decide the question of forfeiture in this case," *id.* at 312, this Court based its decision upon the exclusive *in rem* jurisdiction vested in the federal court:

> This is a seizure for a forfeiture under the laws of the United States, and, consequently, the right to decide upon the same, by the very terms of the statutes, exclusively belongs to the proper court of the United States; and it depends upon its final decree, proceeding *in rem*, whether the seizure is to be adjudged

> right or tortious. If a sentence of condemnation be pronounced, it is conclusive, that a forfeiture is incurred; if a sentence of acquittal, it is equally conclusive against the forfeiture; and in either case, the question cannot be litigated in another forum.

Id. at 312 (emphasis added). This Court explained that the reasonableness of the doctrine "results from the very nature of proceedings *in rem*" and the need to avoid "mischievous consequences":

> The decree of the court acts upon the thing in controversy, and settles the title of the property itself, the right of seizure, and the question of forfeiture. If its decree were not binding upon the world upon the points which it professes to decide, *the consequences would be most mischievous to the public.* In case of condemnation no good title to the property could be conveyed, and no justification of the seizure could be asserted under its protection. In case of acquittal, a new seizure might be made by any other persons *toties quoties* for the same offence, and the claimant be loaded with ruinous costs and expenses.

Id. at 313 (emphasis added). Although the Court noted that the above reasoning applies even where a court of competent jurisdiction lacks exclusive jurisdiction, it found such reasoning to apply "with greater force to a court of exclusive jurisdiction; since an attempt to re-examine its decree, or deny its conclusiveness, is a manifest violation of its exclusive authority." *Id.*

Justice Story's opinion answers the question presented to this Court by Petitioner. In *Gelston*, the Court found to be impermissible the attempt by petitioners to raise, as a defense of the state court action, the right of seizure and question of forfeiture. That defense was recognized as nothing more

than an "indirect" and "collateral" attack on the district court's exclusive *in rem* jurisdiction:

> It is doing that *indirectly*, which the law itself prohibits to be done directly. It is, in effect, *impeaching collaterally*, a sentence which the law has pronounced to be valid until vacated or reversed on appeal by a superior tribunal.

Id. (emphasis added). Accordingly, this Court found that by virtue of the federal district court's decree of acquittal, "the seizure is established conclusively to be tortious, and the party is entitled to his full damages for the injury." *Id.* at 314.

In *Gelston*, this Court premised its decision on the exclusivity and nature of a court's *in rem* jurisdiction, and not merely upon principles of *res judicata*. This is evident from the Court's holding that the exclusive jurisdiction of an *in rem* proceeding applied to the petitioners whether or not they were deemed to have been parties to that proceeding:

> In legal propriety, therefore, he cannot be deemed a stranger to the decree *in rem*; he is at all events a privy, and as such must be bound by a sentence which ascertains the seizure to be tortious. *But if he were a mere stranger, he would still be bound* by such sentence, because the decree of a court of competent jurisdiction *in rem* is, as to the points directly in judgment, conclusive upon the whole world.

Id. at 320 (emphasis added).

Leaving no room for doubt that the teachings of Justice Story apply to this case, the Court expressly recognized in *Gelston* that the principles and reasoning set forth therein would apply with equal force to probate proceedings:

> [N]o principle of general law seems better settled, than that the decision of a court of a peculiar and exclusive jurisdiction must be completely binding upon the judgment of every other court, in which *the same subject matter comes incidentally in controversy*. It is familiarly known in its application to the sentences of ecclesiastical courts, *in the probate of wills and granting of administrations of personal estate*; to the sentences of prize courts in all matters of prize jurisdiction; and to the sentences of courts of admiralty and other courts acting *in rem*, either to enforce forfeitures or to decide civil rights.

Id. at 315 (emphasis added).

In the instant case, as in *Gelston*, the claims asserted in Petitioner's lawsuit against Respondent "come incidentally in controversy" with the "same subject matter" as that adjudicated by the Texas probate court, and thus constitute the kind of "indirect" and "collateral" attack on the probate court's jurisdiction that this Court refused to allow in *Gelston*. Although the Ninth Circuit did not cite *Gelston v. Hoyt* in its opinion, its reasoning closely parallels that of Justice Story nearly two centuries ago. The Ninth Circuit expressly cited to the general principles governing *in rem* jurisdiction and the binding effect "upon the whole world," including United States district courts, of determinations by a court with such jurisdiction. App. 34-35. According to the Ninth Circuit, Petitioner's claim that Decedent intended to give her a gift "went to the very essence of the testamentary instruments executed by J. Howard Marshall II in his lifetime." App. 35. Likewise, her claims that Respondent engaged in transactions which "wrongfully depleted the trust and estate of J. Howard Marshall" were claims that, if successfully brought in probate court, would have resulted in a money judgment against Respondent and in favor of "the estate of J. Howard Marshall II." App. 35. Finding that her claims were "'in substance

nothing more than a thinly veiled will contest,'" App. 31 (quoting *Moser v. Pollin*, 294 F.3d 335, 340 (2d Cir. 2002)), the Ninth Circuit concluded:

> We agree with the contention of E. Pierce Marshall that the probate exception to federal court jurisdiction applies in this case because Vickie Lynn Marshall's claims were simply *a disguised attack* on J. Howard Marshal II's 1982 trust, as amended, and on the postmortem disposition of his property as provided in the trust.

App. 36-37 (emphasis added).

Petitioner's civil proceeding against Respondent proves Justice Story to have been clairvoyant when he warned about the "mischievous consequences" that would result if courts exercising *in rem* jurisdiction were made subject to "indirect," "collateral," "disguised" or "thinly veiled" attacks. Probate courts are granted exclusive jurisdiction in order to grant the relief "against the world" necessary to enable their effective exercise of jurisdiction over the *res*. A rule that permits indirect or collateral challenges to that jurisdiction will undermine the principles that are essential to *in rem* jurisdiction and lead to the very "injurious and unseemly conflict" among federal and state courts that those principles were specially designed to avoid.

IV. THE CONCERNS RAISED BY THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER ARE MISPLACED AND DO NOT WARRANT DEVIATION FROM THE UNIFIED PRINCIPLES THAT GOVERN *IN REM* PROCEEDINGS.

In its brief filed as *amicus curiae* in support of the petitioner, the United States argues for reversal of the Ninth Circuit's decision. The United States raises two concerns with respect to the Ninth Circuit's interpretation of the probate

exception: first, that it will deprive federal courts of jurisdiction to decide disputes over federal tax liability; and second, that it could interfere with the ability of the bankruptcy system to administer debtors' estates expeditiously, fairly and efficiently.

The first concern raised by the United States is misplaced, as illustrated by the Court's decision in *United States v. Bank of New York & Trust Co.*, 296 U.S. 463. In that case, the United States brought suit in federal district court seeking an accounting and delivery of funds in the possession of New York's superintendent of insurance. *Id.* at 470. Based upon the object of the suits, which was "to take the property from the depositaries and from the control of the state court, and to vest the property in the United States to the exclusion of all those whose claims are being adjudicated in the state proceedings," the Court properly held that the federal district court lacked jurisdiction. *Id.* at 478. In so holding, however, the Court recognized that the actions were not brought "merely to establish a debt or a right to share in the property." *Id.* at 478.

This Court's decision in *United States v. Bank of New York & Trust Co.* was specifically cited in *Markham v. Allen*, 326 U.S. 490 (1946), where the Court held in the context of the probate exception that "federal courts of equity have jurisdiction to entertain suits 'in favor of creditors, legatees and heirs' and other claimants against a decedent's estate 'to establish their claims' so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court." *Id.* at 494. Thus, the Ninth Circuit's decision below, if affirmed, will not necessarily defeat the *in personam* jurisdiction of a federal court to adjudicate the federal tax liability of a decedent's estate, where the United States does not also request the federal district court to cause the turnover or other disposition of such estate property, nor otherwise seek to interfere with the probate court's exclusive

jurisdiction in a manner contrary to principles established in *Gelston*, *Markham*, *Hood* and other decisions of this Court.[10]

Nor should the United States or the Program be concerned that this Court's recognition of a "probate exception" consistent with the Ninth Circuit's opinion below would impair the ability of bankruptcy courts to administer bankruptcy estates expeditiously, fairly, and efficiently. In seeking to allow federal court jurisdiction to intrude upon the exclusive *in rem* jurisdiction of probate courts, the United States fails to give due consideration to the more prevalent harm to the bankruptcy system that could result if the exclusive *in rem* jurisdiction of bankruptcy courts were vulnerable to the same kind of indirect attacks that Petitioner has launched against the exclusive *in rem* jurisdiction of the Texas probate court.

In *Hood*, this Court recognized the fundamental importance of a bankruptcy court's broad *in rem* jurisdiction in providing a debtor with the fresh start that is a central purpose of bankruptcy law:

> A bankruptcy court is able to provide the debtor a fresh start in this manner, despite the lack of participation of all of his creditors, because the court's jurisdiction is premised on the debtor and his estate, and not the creditors.

Hood, 541 U.S. at 447. The same principle applies in probate proceedings, where broad *in rem* jurisdiction is also nec-

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[10] The concurrent jurisdiction of federal district courts and probate courts to adjudicate the validity and amount of claims against a decedent's estate is analogous to the concurrent jurisdiction of federal and state courts to adjudicate the validity and amount of claims against a debtor's estate in bankruptcy. But just as a state court clearly lacks jurisdiction to grant a bankruptcy discharge or confirm a plan of reorganization, or adjudicate whether a bankruptcy court properly discharged a debt or confirmed a plan, a federal court lacks jurisdiction to adjudicate the intent of a decedent under a will or trust.

essary to provide complete settlement of a probate estate "against the world":

> The public interest requires that the estates of deceased persons, being deprived of a master, and subject to all manner of claims, should at once devolve to a new and competent ownership; and, consequently, that there should be some convenient jurisdiction and mode of proceeding by which this devolution may be effected with least chance of injustice or fraud; and that the result attained should be firm and perpetual. . . . These objects are generally accomplished by the constitution and powers which are given to probate courts, and the modes provided for reviewing their proceedings. And one of the principal reasons assigned by the equity courts for not entertaining bills on questions of probate is, that the probate courts themselves have all the powers and machinery necessary to give full and adequate relief.

Broderick's Will, 88 U.S. at 509-10.

As explained *supra*, the principles of *in rem* jurisdiction that this Court has developed over the past two hundred years has not only enabled bankruptcy, probate and other courts to exercise their *in rem* jurisdiction more effectively, but also has been characterized by this Court as essential to preserve harmony and cooperation among federal and state courts. Given those policy imperatives, the specific concerns raised by the United States as *amicus curiae*, even if they were germane, should nevertheless yield to the invaluable benefits achieved through a unified theory of *in rem* jurisdiction that is designed to avoid "injurious conflicts" among courts. One need look no further than the history of this case, and the conflict that arose between the federal bankruptcy court and

state probate court, to remind us of the larger importance of those principles.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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No. 04-1544

IN THE

Supreme Court of the United States

VICKIE LYNN MARSHALL,

Petitioner,

v.

E. PIERCE MARSHALL,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* ERIC YOLLICK, DEPENDENT ADMINISTRATOR OF THE ESTATE OF HERBERT CLINTON SISCO IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST[1]

The *Amicus Curiae* is a solo practitioner attorney in The Woodlands, Montgomery County, Texas, whom County Court at Law Number Three of Montgomery County, Texas, a state court with probate jurisdiction, appointed to serve as personal representative of the Estate of Herbert Clinton Sisco in 2002. The *Amicus* is deeply interested in this case, because of the important effect its outcome could have on the validity of state probate proceedings in general and on the Herbert Clinton Sisco Estate probate proceeding in particular. The *Amicus* files this brief to offer analysis to the Court as the Court considers whether Congress intended to usurp the jurisdiction of state courts to probate decedent's estates when it conferred jurisdiction on bankruptcy courts.

The *Amicus* urges the Court to continue to hold that the probate exception to federal jurisdiction constitutes a recognition of the fact that the Constitution and the Congress intended to allocate jurisdiction over probate estates to the state courts. This brief focuses on the issue by analyzing the historical and rational nature of the federalist allocation of jurisdiction between state and federal courts and by analyzing Congressional intent during the enactment of the Bankruptcy Code with respect to probate matters.

---

1. Eric Yollick, Dependent Administrator of the Estate of Herbert Clinton Sisco, authored the brief in whole and made all monetary contributions to the preparation and submission of the brief. The Amicus files this brief with the written consent of both parties, which such consents are on file with the Clerk.

SUMMARY OF ARGUMENT

The Court should not condone the invocation of bankruptcy as a tool to usurp the jurisdiction of state courts over probate estates. The probate exception to federal jurisdiction is a recognition that, under our federalist system of government, certain areas of judicial responsibility lie solely within the province of state courts. In The Federalist No. 82 (Alexander Hamilton), state courts clearly retained their primitive jurisdiction, unless the Constitution took that jurisdiction away in one of the enumerated modes. Likewise, because the states are independent sovereigns in the federal system, this Court has long presumed that Congress did not cavalierly pre-empt traditional state regulation of a particular field of law unless Congress has made such an intention clear and manifest. *Bates v. Dow Agrosciences LLC*, 125 S. Ct. 1788, 1801 (2005).

Both this Court and many commentators have recognized the historical basis of the probate exception to federal jurisdiction, to wit, that federal courts should not interfere in state court probate proceedings. This historical basis arises from Congressional action in the creation of federal jurisdiction in the Judiciary Act of 1789 and from the rationality of divergent approaches to problems of public policy at the state level in our federal court system.

In the instance of the Bankruptcy Code and the bankruptcy courts, the probate exception is also the result of clear Congressional intent. Congress was cognizant of the probate exception to federal jurisdiction during its passage of the Bankruptcy Code in 1978. Bankruptcy Code of 1978, Pub. L. 95-598 (codified as amended in 11 U.S.C. and in 28 U.S.C. § 1334). Nevertheless, Congress' statutory

codification of the Bankruptcy Code did not work a change in the probate exception, as Congress did not clearly express such an intent. *See Keene Corp. v. United States*, 508 U.S. 200, 209 (1993).

If the Court were to overrule longstanding precedent to determine that the invocation of bankruptcy jurisdiction trumped the probate jurisdiction of the states, this Court would encourage forum shopping by heirs and legatees who were unhappy with the direction of state probate proceedings. Bankruptcy courts would become the probate courts of America.

ARGUMENT

1. The Court has long recognized that Congress intended to except probate jurisdiction from the federal courts.

A federal court has no jurisdiction to probate a will or administer a probate estate. *Markham v. Allen*, 326 U.S. 490, 494 (1946). The reason for this probate exception to federal court jurisdiction is that the equity jurisdiction, which the Judiciary Act of 1789, 1 Stat. 73 and section 24(1) of the Judicial Code, conferred, did not extend to probate matters. *Id.*; *Sutton v. English*, 246 U.S. 199, 205 (1918); *O'Callaghan v. O'Brien*, 199 U.S. 89, 101-10 (1905); *In re Broderick's Will*, 88 U.S. 503, 510-15 (1874).

It is well-established that a federal court may not interfere with state court probate proceedings, may not assume general jurisdiction of the probate, and may not assume control of the property in the custody of a state probate court. *Markham*, 326 U.S. at 494.

Similarly, a federal court may not exercise its jurisdiction to disturb or affect the possession of property in the custody of a state probate court. *Id.*

This Court has excepted probate jurisdiction from bankruptcy courts as well as other federal courts. *Harris v. Zion Sav. Bank & Trust Co.*, 317 U.S. 447, 450-53 (1943).

2. Congress clearly intended to continue the probate exception to federal jurisdiction when Congress enacted the Bankruptcy Code in 1978.

This Court does not presume that a statutory codification worked a change in the underlying substantive law, unless Congress clearly expressed an intent to make such a change. *Keene Corp. v. United States*, 508 U.S. 200, 209 (1993).

The Court assumes that Congress is aware of existing law when it passes legislation. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990). Congress is presumed at the time of statutory enactments to have been cognizant of the law, which the Supreme Court has pronounced. *Cary v. Curtis*, 44 U.S. 236, 240 (1845). It is always appropriate to assume that our elected representatives, like other citizens, know the law. *Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979). The Court is especially justified in presuming that those elected representatives were aware of the prior interpretations of statutes. *Id.* at 697.

This Court presumes that Congress expects its statutes to be read in conformity with the Supreme Court's precedents. *United States v. Wells*, 519 U.S. 482, 495 (1997).

Congress was explicitly cognizant of the probate exception to federal court jurisdiction during its enactment of Bankruptcy Code in 1978.

Congress established the Commission on the Bankruptcy Laws of the United States by Public Law 91-354 (84 Stat. 468), effective July 24, 1970. On July 30, 1973, the Commission filed its Report with the President, the Congress, and the Chief Justice of the United States as part of the consideration leading to the enactment of Public Law 95-598, the Bankruptcy Code of 1978. A&P H.R. Doc. 93-137 *v (July 30, 1973).

The Commission reported the following with respect to the probate exception to federal bankruptcy court jurisdiction:

> In light of the tradition of federal deference to state control of administration of decedents' estates and the complications and potential for increased litigation and increased costs arising from any change, substantial need should exist before any extension of federal legislation to cover insolvent decedents' estates is proposed . . . The defects in states probate protections for creditors are not new and the gap in federal law in relation to insolvent decedents' estates has existed throughout the history of our bankruptcy rules. Still . . . no statistical studies . . . suggest that creditors are being disappointed in relation to collection from estates. Further, representatives of commercial creditors remained totally silent during the seven years of preliminary discussions and drafting that went into the Uniform Probate Code . . . ***Based on the lack of evidence of serious concrete problems under***

> ***the existing law and the promise of genuine reform at the state level as a result of the widespread adoption of the Uniform Probate Code, the Commission recommends that the Bankruptcy Act not be extended to administration of decedents' estates other than to the extent necessary to wind up the administration of the estates of debtors who die after the date of the petition.***

Id. at 184-85 (emphasis added).

The failure of Congress to alter or amend a statutory section, notwithstanding a consistent construction by the jurisdiction charged with its enforcement, creates a presumption in favor of the interpretation, to which the Court should give great weight, even if the Court doubted the correctness of the interpretive ruling. *See Costanzo v. Tillinghast*, 287 U.S. 341, 345 (1932).

During statutory construction, the Court will consider that there is no evidence of any intent to repudiate a longstanding construction of a statute. *Haig v. Agee*, 453 U.S. 280, 297-98 (1981).

The Commission's Report clearly recommended that Congress follow longstanding statutory construction of the jurisdictional statutes for bankruptcy courts with respect to the probate exception to federal jurisdiction.

Nowhere in the legislative history of the Bankruptcy Code of 1978 (which included amendment of the provisions of 28 U.S.C. § 1334) did Congress evince an intent to change the longstanding law, which this Court had pronounced.

Congress' explicit cognisance of the probate exception during its consideration of the enactment of the 1978 Bankruptcy Code, its failure to show any interest in rejecting the recommendations of the Commission, and its cognisance of the probate exception as a matter of statutory construction law support the presumption that Congress expected the Bankruptcy Code's jurisdictional provisions to be read in conformity with the Supreme Court's longstanding precedents with respect to the probate exception. *Wells*, 519 U.S. 482, 495 (1997).

3. The historical basis of our federalist court system supports the probate exception.

In our federalist court system, state courts clearly retained their primitive jurisdiction, unless the Constitution took that jurisdiction away in one of the enumerated modes. The Federalist No. 82 (Alexander Hamilton). State courts were not divested of any part of their primitive jurisdiction – at the time of the adoption of the Constitution – except to the extent that may relate to appeal from the state courts to the Supreme Court. *Id.*

Because the states are independent sovereigns in the federal system, this Court has long presumed that Congress did not cavalierly pre-empt traditional state regulation of a particular field of law unless Congress has made such an intention clear and manifest. *Bates v. Dow Agrosciences LLC*, 125 S. Ct. 1788, 1801 (2005).

The Constitutional limitation upon Congressional action to declare substantive rules of law applicable in states was clear in *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Congress has no such authority to declare substantive rules

of law applicable in a state whether they be local in their nature or general or whether they be commercial law or a part of the law of torts. *Id.* There is no federal common law. *Id.*

Judge Posner recognized the rational basis – the promotion of legal certainty – of a federalist allocation of probate jurisdiction away from the federal courts. *Dragan v. Miller*, 679 F.2d 712, 714 (7th Cir. 1982), *cert. den'd*, 459 U.S. 1017 (1982). As the Circuit Court noted:

> If an issue may end up being litigation in either a state or a federal court, its resolution is less certain, less predictable, than if it can be litigation in one or the other forum only, even if the same substantive law is applied. Certainty is desirable in every area of the law but has been thought especially so with regard to the transfer of property at death. *See, e.g.*, Restatement (Second) of Conflict of Laws, s 11, comment c (1971). There are obstacles enough to effectuating testamentary intentions; legal uncertainty ought not to be one of them.

679 F.2d at 714. While making this argument, Judge Posner concluded that it was not a very powerful argument. *Id.*

Judge Posner did recognize, however, that judicial economy is a more compelling reason for the probate exception, because it is hard to imagine how the initial jurisdiction over the decedent's estate could be elsewhere than in a state court. *Id.* If the probate proceeding must begin in state court, then the interest in judicial economy argues for keeping it there until it is concluded. *Id.* Furthermore, if for reasons of judicial economy, the state courts are going

to have a measure of exclusive jurisdiction in probate matters, federal courts will not have much experience in adjudicating those issues characteristic of probate proceedings and will have far less "relative expertness" in the substantive law of such matters. *Id.*

Judicial economy in a federalist court system and the recognition of the validity of state court probate proceedings clearly are critical bases for the probate exception to federal court jurisdiction. In *Markham*, this Court held that the reach of the probate exception was such that a federal court could not interfere with probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court. 326 U.S. at 494. Thus, for example, a determination of an issue that would necessitate an accounting is strictly a probate matter which would take the case beyond federal jurisdiction. *Starr v. Rupp*, 421 F.2d 999, 1006 (6th Cir. 1970). Similarly, a plaintiff's claim which implicates the validity of the probate proceedings is beyond federal jurisdiction. *Breaux v. Dilsaver*, 254 F.3d 533, 536 (5th Cir. 2001); *Blakeney v. Blakeney*, 664 F.2d 433, 434 (5th Cir. 1981).

Neither the Constitution nor Congressional enactments have shown a clear and manifest intent to infringe upon state regulation of probate matters. In fact, Congress' intent suggests that Congress did not intend to abrogate the probate exception. *See* discussion, under 2, *supra*.

Many, if not most, jurisdictions place the probate jurisdiction exclusively within specialized state courts. *See, e.g., Broderick's Will*, 88 U.S. at 515 (California); *Starr*, 421 F.2d at 1006 (Ohio); Tex. Prob. Code Ann. § 5 (Vernon 2005) (Texas).

Permitting federal courts to exercise probate jurisdiction would destroy the specialized state court regulation of such matters by encouraging the development of a federal common law of probate. Such a development would contravene the Constitutional basis of the federalist system of courts in which state courts have retained their primitive jurisdiction over probate matters.

4. The probate exception has an economic basis.

The Commission of the Bankruptcy Laws of the United States' observation that commercial creditors, who had a special interest in the reform of the bankruptcy statutes, did not show an interest in the reform of the probate system (*see* discussion at 2, *supra*), reveals that there is an economic benefit: (1) from the probate exception to federal court jurisdiction; and (2) from state regulation of probate matters.

Judge Posner has noted the economics of federalism in his landmark treatise on the Economic Analysis of Law:

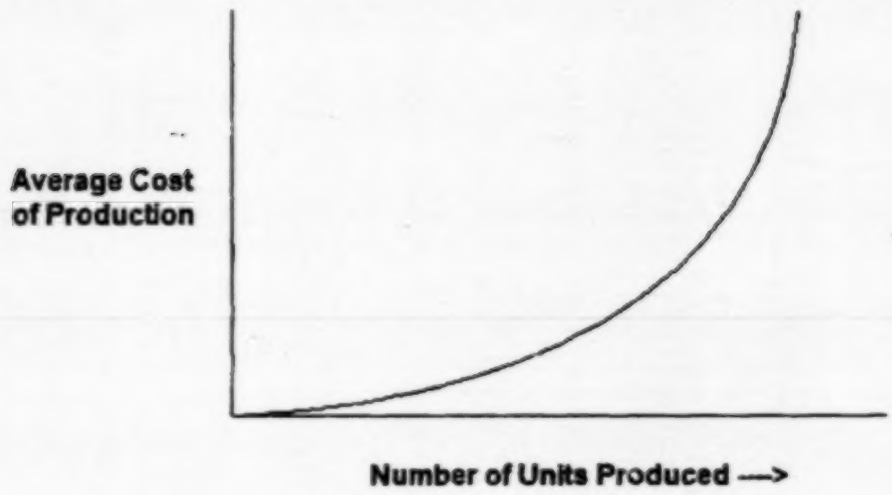
> *Diseconomies of scale and diversity of approaches.* If all government in the United States were federal, the bureaucracy of government would be immense and unwieldy, and the scope of experimentation with divergent approaches to problems of public policy would be curtailed. In principle, any organization can avoid problems of giantism and monolithicity by adopting a decentralized form of organization, as many business firms do by constituting different branches of the firm as separate profit centers...since we have state governments already, it may make more sense to assign them functions

> in which diversity or small scale is desirable than to decentralize the federal government.

Richard Posner, Economic Analysis of Law 696 (Aspen Law & Business, 5th ed.,1998).

This Court has recognized, for example, that our Nation's banking system has thrived while experiencing disparities in matters of corporate governance from the divergent state-law governance standards applicable to banks chartered in different states. *See Atherton v. Fed. Deposit Ins. Corp.*, 519 U.S. 213, 220 (1997). Similarly, this Court has accepted divergent state property laws, particularly with respect to homestead and marital property rights. *See, e.g., United States v. Yazell*, 382 U.S. 341, 355-56 (1966).

Diseconomies of Scale



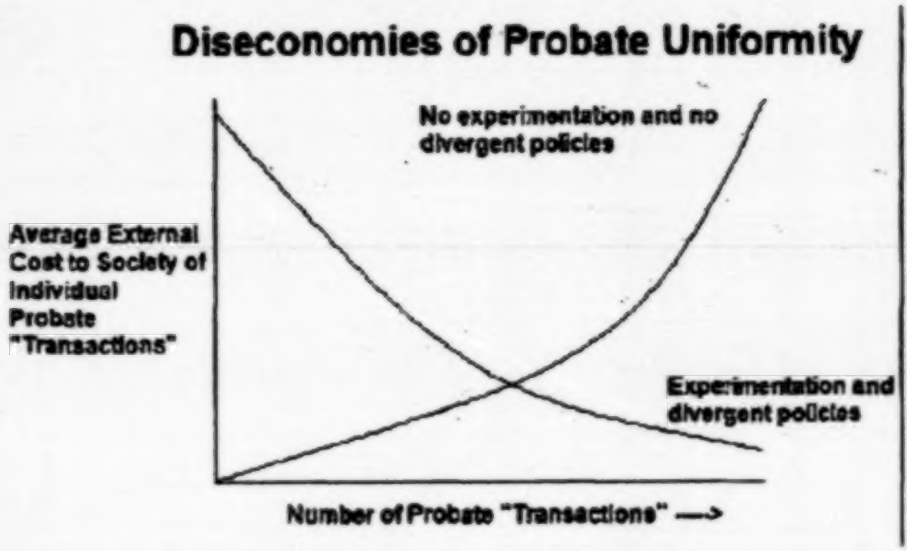
A classic diseconomy of scale involves the phenomenon that the average cost of production of some product *increases* with the number of units of output.

The Commission recorded no complaints with the federalist system of probate laws where divergent state rules controlled the distribution of decedent's estates. *See* discussion at part 2, *supra*.

Similarly, this Court in a number of opinions has noted that there are no problems – in banking, property laws, and exemption laws, to name a few – with divergent state rules of law in particular areas.

Judge Posner, however, has noted that there is a diseconomy of scale where laws become too uniform and the legal system suffers from giantism and monolithicity.

What is lost in the uniformity is the experimentation with divergent approaches to public policy. Thus, society as a whole will suffer a cost from uniformity but would otherwise enjoy substantial gains from experimentation between jurisdictions in divergent approaches to probate policy.



5. Elimination of the probate exception from bankruptcy court jurisdiction would encourage forum shopping and would endanger the federalist allocation of probate jurisdiction.

This Court has long sought to discourage forum shopping. *See, e.g., Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 820 (1985).

Opening bankruptcy courts to probate controversies by the elimination of the probate exception to federal jurisdiction would encourage unhappy heirs or legatees to file bankruptcy in order to opt for a forum which they perceive is more favorable than a state probate court might be. This danger is particularly substantial in light of the implications of the general policy of the Bankruptcy Code to maximize the debtor's estate for the benefit of the debtor's creditors. *See* Brief of *Amici Curiae* Professors Richard Aaron, *et al.*, at 23-25, *Marshall v. Marshall*, 2005 WL 3156908 (2005).

If bankruptcy courts were to apply probate law in the context of this policy to maximize the debtor's estate, then an heir would have a powerful incentive to seek bankruptcy protection in order to maximize his or her probate recovery.

Two factual situations provide particularly striking examples of this sort of forum shopping.

The first such example is the case before this Court. It is undisputed that Petitioner initially sought in the Texas probate court the relief against Respondent which she eventually received in the bankruptcy court. During the probate proceedings, Petitioner filed for bankruptcy protection in California and there pursued her identical claim in that

court as well. Petitioner prevailed in the bankruptcy court, while the Texas probate court dismissed her claim against Respondent there.

The primary result of the procedural maneuvering was a multiplicity of litigation, so that Petitioner could pursue her claim in a forum which she believed was more favorable to her than the Texas probate court.

The scenario of the Herbert Clinton Sisco Estate, which the *Amicus* presents as a hypothetical situation only, provides a much more striking example of the forum shopping and direct threat to state probate proceedings which would result from the elimination of the probate exception to federal court jurisdiction in the bankruptcy context. The scenario[2] follows:

> Herbert Clinton Sisco ("Herbert") died in 1993 with an estate which his son, Jon Sisco ("Jon"), had sworn was worth approximately $1 million. Jon had served as the guardian for his sick father before his father died. While serving as guardian, Jon had taken more than $271,000 from his

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2. The *Amicus* presents the scenario as a hypothetical. The scenario in reality is not hypothetical but constitutes a summary of three proceedings: (1) the bankruptcy proceeding, *In re Jon Allan Sisco*, Case No. 04-30608, and the adversary proceeding, *Eric Yollick, Dependent Administrator of the Estate of Herbert Clinton Sisco* v. *Jon Allan Sisco*, Case No. 04-03252, both pending in the United States Bankruptcy Court for the Southern District of Texas, Houston Division; (2) the probate proceeding, *In re Estate of Herbert Clinton Sisco*, cause number 01-19,047-P, pending in County Court at Law Number Three of Montgomery County, Texas; and (3) the guardianship proceeding, *In re Herbert Clinton Sisco*, cause number 12,286, pending in County Court at Law Number Three of Montgomery County, Texas.

father's estate by writing checks to himself and for Jon's personal benefit.

Jon is a very wealthy man as a result of a trust fund which his mother (who was divorced from Herbert 50 years ago) established and which pays him approximately $250,000 per year.

When Herbert died, he left five (5) heirs and arguably no valid will. Jon continued to operate the estate of Herbert as though Herbert were still alive. Jon collected hundreds of thousands of dollars of rental income, bought and sold property in his father's name, and never filed any estate or estate income tax returns. Jon paid the money to himself. For nine (9) years, Jon acted as pseudo-administrator, filed lawsuits on the estate's behalf, and even signed affidavits stating that he was the "executor" of his father's estate. In 2001, after a state district judge dismissed a lawsuit that Jon had filed allegedly as "executor" of his father's estate where Jon had never opened a probate proceeding, Jon commenced a probate proceeding and asked the probate court to name him as executor of his father's estate.

The probate court held a lengthy hearing and determined that Jon was not a suitable representative for the estate, because: (1) Jon is a felon convicted of embezzlement from a bank; (2) Jon had never filed an estate tax return for his father; and (3) Jon had operated his father's estate for many years without authority. Instead, the probate court appointed Eric Yollick, a stranger to the Sisco

family, to act as administrator in a capacity fully dependent upon the probate court's orders for his authority, i.e. a "dependent administrator."

The probate court ordered Yollick to sue Jon for misappropriating funds from Jon's father's guardianship estate. Yollick sued Jon in the probate court. Yollick filed a motion for summary judgment against Jon for breach of fiduciary duty as guardian and received a hearing date of January 7, 2004.

Jon was very unhappy with several of the rulings of the Texas probate judge. Therefore, Jon filed bankruptcy on January 6, 2004, in order to avoid the summary judgment hearing and in an attempt to move the entire probate proceeding before the bankruptcy judge. The bankruptcy judge recognized Jon's attempted "forum shopping" and lifted the automatic stay of 11 U.S.C. § 362 to permit the probate administration to continue.

The probate administration continued. A second probate judge approved all of Yollick's accountings and all of Yollick's actions as dependent administrator. The probate judge found that Yollick "managed the probate estate in the manner in which a prudent man would manage his own affairs." The probate judge's orders approving the accountings and for other matters are all final orders for preclusion purposes under Texas law.

Frustrated with the probate proceeding in the Texas probate court, Jon decided to sue Yollick for breach of fiduciary duty, civil conspiracy

(allegedly with the probate judge and with Yollick's probate lawyer), and fraud in the bankruptcy court. Despite Yollick's protests that the bankruptcy court lacked jurisdiction under the probate exception to federal jurisdiction, the bankruptcy court permitted Jon to proceed. The bankruptcy court has issued numerous orders that directly contradict the Texas probate court. For example, the bankruptcy court ordered Yollick to turn certain property over to Jon, while the probate court had previously ordered Jon to turn that same property over to Yollick. The probate court entered an order permitting Yollick to pay his attorney fee defense costs for Jon's bankruptcy claims. The bankruptcy court ordered Yollick personally to post a bond in favor of the bankruptcy court for any probate estate funds which the probate estate paid for Yollick's attorney fees, thereby preventing Yollick from paying his attorneys any fees. The bankruptcy court has ignored the probate court's orders approving Yollick's accountings and has ignored the probate court's orders approving all of Yollick's conduct as dependent administrator. The bankruptcy court has ignored hornbook Texas probate law that an heir cannot sue an estate's administrator while the probate estate remains open and pending. In short, the bankruptcy court has subjected Yollick to multiple conflicting orders during an extraordinarily expensive litigation matter where Jon's entire purpose is to question the validity of the Texas probate proceeding.

Jon repeatedly lost in the Texas probate proceeding in front of four (4) different state probate judges who heard various matters. He lost an appeal of two matters which he filed in a Texas Court of Appeals. Jon filed fifteen (15) State Bar grievances against Yollick, five (5) against Yollick's probate lawyer, and three others against other attorneys, all to no avail. Jon filed a criminal complaint against one of the probate judges, Yollick, and Yollick's probate lawyer, which such criminal complaint was dismissed after an investigation by a special prosecutor.

Jon filed an estate tax return under Yollick's name and without Yollick's knowledge claiming that no estate taxes were owed. Jon presented a copy of a will for probate that was questionable under the best of circumstances. Jon misrepresented the value of the probate estate to the other heirs, so that they would not ask for much money when he attempted to purchase their interests.

The bankruptcy court, however, has allowed a trial, which has lasted off and on for three months, to proceed where Jon's entire purpose is to question the validity of the probate court's orders and other proceedings. In order to stop the probate court from taking any action which might harm Jon's causes of action against Yollick, such as making rulings which approve Yollick's conduct as dependent administrator, the bankruptcy court is considering whether to enjoin the probate court from any further proceedings. By the end of the

litigation, it is likely that all of the probate estate's funds will go to attorneys for litigation expenses.

In the foregoing scenario, Jon's claims constitute little more than forum shopping. Jon's claims are a direct threat to the validity of state probate proceedings. By filing bankruptcy before a judge who has no probate experience and who has not recognized the validity of the probate exception to federal jurisdiction, Jon has proceeded to trial on a very expensive claim with little merit, because its very basis contradicts the findings and orders of the state probate proceeding, which Jon chose not to appeal.

Jon's actions and, to a lesser degree, the actions of Petitioner constitute a direct threat to the federalist system of allocated jurisdiction between the National government and the states.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

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MARSHALL *v.* MARSHALL

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 04–1544. Argued February 28, 2006—Decided May 1, 2006

Among longstanding limitations on federal-court jurisdiction otherwise properly exercised are the so-called "domestic relations" and "probate" exceptions. Neither is compelled by the text of the Constitution or federal statute. Both are judicially created doctrines stemming in large measure from misty understandings of English legal history. In view of lower federal-court decisions expansively interpreting the two exceptions, this Court reined in the domestic relations exception in *Ankenbrandt* v. *Richards*, 504 U. S. 689, and endeavored similarly to curtail the probate exception in *Markham* v. *Allen*, 326 U. S. 490.

Petitioner, Vickie Lynn Marshall (Vickie), a.k.a. Anna Nicole Smith, is the surviving widow of J. Howard Marshall II (J. Howard), who died without providing for Vickie in his will. According to Vickie, J. Howard intended to provide for her through a gift in the form of a "catch-all" trust. Respondent, E. Pierce Marshall (Pierce), J. Howard's son, was the ultimate beneficiary of J. Howard's estate plan. While the estate was subject to ongoing Texas Probate Court proceedings, Vickie filed for bankruptcy in California. Pierce filed a proof of claim in the federal bankruptcy court, alleging that Vickie had defamed him when, shortly after J. Howard's death, her lawyers told the press that Pierce had engaged in forgery, fraud, and overreaching to gain control of his father's assets. Pierce sought a declaration that his claim was not dischargeable in bankruptcy. Vickie answered, asserting truth as a defense. She also filed counterclaims, among them a claim that Pierce had tortiously interfered with a gift she expected from J. Howard. Vickie's tortious interference counterclaim turned her objection to Pierce's claim into an adversary proceeding, see Fed. Rule Bkrtcy. Proc. 3007, in which the Bankruptcy Court granted summary judgment for Vickie on Pierce's claim and,

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after a trial on the merits, entered judgment for Vickie on her counterclaim. The court also held that both Vickie's objection to Pierce's claim and her counterclaim qualified as "core proceedings" under 28 U. S. C. §157, which meant that the court had authority to enter a final judgment disposing of those claims. It awarded Vickie substantial compensatory and punitive damages. Pierce then filed a post-trial motion to dismiss for lack of subject-matter jurisdiction, asserting that Vickie's tortious interference claim could be tried only in the Texas probate proceedings. The Bankruptcy Court denied the motion. Relying on *Markham*, the Bankruptcy Court observed that a federal court has jurisdiction to adjudicate rights in probate property, so long as its final judgment does not interfere with the state court's possession of the property. Subsequently, the Texas Probate Court declared that J. Howard's estate plan was valid.

Back in the federal forum, Pierce sought district-court review of the Bankruptcy Court's judgment. Among other things, the District Court held that the probate exception did not reach Vickie's counterclaim. Citing *Markham*, 326 U. S., at 494, the court said that the exception would bar federal jurisdiction only if such jurisdiction would "interfere" with the probate proceedings. It would not do so, the court concluded, because: (1) success on Vickie's counterclaim did not necessitate any declaration that J. Howard's will was invalid, and (2) under Texas law, probate courts do not have exclusive jurisdiction to entertain claims of the kind Vickie's counterclaim asserted. The court also held that Vickie's claim did not qualify as a "core proceedin[g]" over which a bankruptcy court may exercise plenary power, see 28 U. S. C. §157(b)–(c). Accordingly, the District Court treated the Bankruptcy Court's judgment as proposed, rather than final, and undertook *de novo* review. Adopting and supplementing the Bankruptcy Court's findings, the District Court determined that Pierce had tortiously interfered with Vickie's expectancy by, *inter alia*, conspiring to suppress or destroy the *inter vivos* trust instrument J. Howard had directed his lawyers to prepare for Vickie, and to strip J. Howard of his assets by backdating, altering, and otherwise falsifying documents and presenting them to J. Howard under false pretenses. The District Court awarded Vickie some $44.3 million in compensatory damages and, based on "overwhelming" evidence of Pierce's willfulness, maliciousness, and fraud, an equal amount in punitive damages.

The Ninth Circuit reversed. Although the Court of Appeals recognized that Vickie's claim does not involve the administration of an estate, the probate of a will, or any other purely probate matter, it nonetheless held that the probate exception bars federal jurisdiction in this case. It read the exception broadly to exclude from the federal

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courts' adjudicatory authority not only direct challenges to a will or trust, but also questions which would ordinarily be decided by a probate court in determining the validity of the decedent's estate planning instrument, whether those questions involve fraud, undue influence, or tortious interference with the testator's intent. The court also held that a State's vesting of exclusive jurisdiction over probate matters in a special court strips federal courts of jurisdiction to entertain any probate related matter, including claims respecting tax liability, debt, gift, and tort. Noting that the Probate Court had ruled it had exclusive jurisdiction over all of Vickie's claims, the Ninth Circuit held that ruling binding on the Federal District Court.

Held: The Ninth Circuit had no warrant from Congress, or from this Court's decisions, for its sweeping extension of the probate exception recognized in those decisions. Because this case does not fall within the exception's scope, the District Court properly asserted jurisdiction over Vickie's counterclaim against Pierce. Pp. 8–18.

(a) *Ankenbrandt* addressed the domestic relations exception's derivation and limits. Among other things, the Court, 504 U. S., at 693–695, traced the current exception to *Barber* v. *Barber*, 21 How. 582, 584–589, in which the Court had announced in dicta—without citation or discussion—that federal courts lack jurisdiction over suits for divorce or alimony. Finding no Article III impediment to federal-court jurisdiction in domestic relations cases, 504 U. S., at 695–697, the *Ankenbrandt* Court, *id.*, at 698–701, anchored the exception in the Judiciary Act of 1789, which, until 1948, provided circuit court diversity jurisdiction over "all suits of a civil nature at common law or in equity." The *Barber* majority, the *Ankenbrandt* Court acknowledged, 504 U. S., at 698, did not expressly tie its announcement of a domestic relations exception to the text of the diversity statute, but the *Barber* dissenters made the connection. Because English chancery courts lacked authority to issue divorce and alimony decrees, the dissenters stated, United States courts similarly lacked authority to decree divorces or award alimony. 21 How., at 605. The *Ankenbrandt* Court was "content" "to rest [its] conclusion that a domestic relations exception exists as a matter of statutory construction not on the accuracy of [*Barber*'s] historical justifications, but, 'rather,' on 'Congress' apparent acceptance of this construction of the diversity jurisdiction provisions in the years prior to 1948.'" 504 U. S., at 700. *Ankenbrandt* further determined that Congress did not intend to terminate the exception in 1948 when it "replace[d] the law/equity distinction with the phrase 'all civil actions.'" *Id.*, at 700. The *Ankenbrandt* Court nevertheless emphasized that the exception covers only "a narrow range of domestic relations issues." *Id.*, at 701. Noting that some lower federal courts had applied the exception "well beyond the cir-

cumscribed situations posed by *Barber* and its progeny," *ibid.*, the Court clarified that only "divorce, alimony, and child custody decrees" remain outside federal jurisdictional bounds. *id.*, at 703, 704. While recognizing state tribunals' "special proficiency" in handling issues arising in the granting of such decrees, *id.*, at 704, the Court viewed federal courts as equally equipped to deal with complaints alleging torts, *ibid.* Pp. 8–11.

(b) This Court has recognized a probate exception, kin to the domestic relations exception, to otherwise proper federal jurisdiction. See, *e.g.*, *Markham*, the Court's most recent and pathmarking pronouncement on the subject. Among other things, the *Markham* Court first stated that, although "a federal court has no jurisdiction to probate a will or administer an estate[,] it has [long] been established . . . that federal courts of equity have jurisdiction to entertain suits 'in favor of creditors, legatees and heirs' and other claimants against a decedent's estate 'to establish their claims' so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court." 326 U. S., at 494. The Court next described a probate exception of distinctly limited scope: "[W]hile a federal court may not exercise its jurisdiction to disturb or affect the possession of property in the custody of a state court, . . . it may exercise its jurisdiction to adjudicate rights in such property where the final judgment does not undertake to interfere with the state court's possession save to the extent that the state court is bound by the judgment to recognize the right adjudicated by the federal court." *Ibid.* The first of these quoted passages is not a model of clear statement, and some lower federal courts have read the words "interfere with the probate proceedings" to block federal jurisdiction over a range of matters well beyond probate of a will or administration of a decedent's estate, including an executor's breach of fiduciary duty. This Court reads *Markham*'s enigmatic words, in sync with the second above-quoted passage, to proscribe "disturb[ing] or affect[ing] the possession of property in the custody of a state court." *Ibid.* Though that reading renders the first-quoted passage in part redundant, redundancy in this context is preferable to incoherence. This Court therefore comprehends *Markham*'s "interference" language as essentially a reiteration of the general principle that, when one court is exercising *in rem* jurisdiction over a *res*, a second court will not assume *in rem* jurisdiction over the same *res*. See, *e.g.*, *Penn General Casualty Co.* v. *Pennsylvania ex rel. Schnader*, 294 U. S. 189, 195–196. Thus, the probate exception reserves to state probate courts the probate or annulment of a will and the administration of a decedent's estate; it also precludes federal courts from disposing of property that is in the custody

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of a state probate court. But it does not bar federal courts from adjudicating matters outside those confines and otherwise within federal jurisdiction. Pp. 11–15.

(c) Vickie's claim does not involve the administration of an estate, the probate of a will, or any other purely probate matter. Provoked by Pierce's claim in the bankruptcy proceedings, Vickie's claim alleges the widely recognized tort of interference with a gift or inheritance. She seeks an *in personam* judgment against Pierce, not the probate or annulment of a will. Cf. *Sutton* v. *English*, 246 U. S. 199, 208. Nor does she seek to reach a *res* in a state court's custody. See *Markham*, 326 U. S., at 494. Furthermore, no "sound policy considerations" militate in favor of extending the probate exception to cover this case. Cf. *Ankenbrandt*, 504 U. S., at 703. Trial courts, both federal and state, often address conduct of the kind Vickie alleges. State probate courts possess no "special proficiency" in handling such issues. Cf. *id.*, at 704. P. 15.

(d) This Court rejects the Ninth Circuit's alternate rationale that the Texas Probate Court's jurisdictional ruling bound the Federal District Court. Texas courts have recognized a state-law tort action for interference with an expected gift or inheritance. It is clear, under *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, that Texas law governs the substantive elements of Vickie's tortious interference claim. But it is also clear that Texas may not reserve to its probate courts the exclusive right to adjudicate a transitory tort. See *Tennessee Coal, Iron & R. Co.* v. *George*, 233 U. S. 354, 360. Jurisdiction is determined "by the law of the court's creation and cannot be defeated by the extraterritorial operation of a [state] statute . . . , even though it created the right of action." *Ibid.* Directly on point, the Court has held that federal-court jurisdiction, "having existed from the beginning of the Federal government, [can] not be impaired by subsequent state legislation creating courts of probate." *McClellan* v. *Carland*, 217 U. S. 268, 281. *Durfee* v. *Duke*, 375 U. S. 106, on which the Ninth Circuit relied, is not to the contrary. *Durfee* stands only for the proposition that a state court's final judgment determining *its own* jurisdiction ordinarily qualifies for full faith and credit, so long as the jurisdictional issue was fully and fairly litigated in the court that rendered the judgment. See *id.*, at 111, 115. At issue here, however, is not the Texas Probate Court's jurisdiction, but the federal courts' jurisdiction to entertain Vickie's tortious interference claim. Under our federal system, Texas cannot render its probate courts exclusively competent to entertain a claim of that genre. Pp. 15–17.

(e) The Ninth Circuit may address on remand the questions whether Vickie's claim was "core" and Pierce's arguments concerning claim and issue preclusion. P. 17–18.

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392 F. 3d 1118, reversed and remanded.

GINSBURG, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, SOUTER, THOMAS, BREYER, and ALITO, JJ., joined. STEVENS, J., filed an opinion concurring in part and concurring in the judgment.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 04–1544

VICKIE LYNN MARSHALL, PETITIONER *v.* E. PIERCE MARSHALL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[May 1, 2006]

JUSTICE GINSBURG delivered the opinion of the Court.

In *Cohens* v. *Virginia*, Chief Justice Marshall famously cautioned: "It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction, if it should . . . . We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." 6 Wheat. 264, 404 (1821). Among longstanding limitations on federal jurisdiction otherwise properly exercised are the so-called "domestic relations" and "probate" exceptions. Neither is compelled by the text of the Constitution or federal statute. Both are judicially created doctrines stemming in large measure from misty understandings of English legal history. See, *e.g.*, Atwood, Domestic Relations Cases in Federal Court: Toward a Principled Exercise of Jurisdiction, 35 Hastings L. J. 571, 584–588 (1984); *Spindel* v. *Spindel*, 283 F. Supp. 797, 802 (EDNY 1968) (collecting cases and commentary revealing vulnerability of historical explanation for domestic relations exception); Winkler, The Probate Jurisdiction of the Federal Courts, 14 Probate L. J. 77, 125–126, and n. 256 (1997) (describing historical

explanation for probate exception as "an exercise in mythography"). In the years following Marshall's 1821 pronouncement, courts have sometimes lost sight of his admonition and have rendered decisions expansively interpreting the two exceptions. In *Ankenbrandt* v. *Richards*, 504 U. S. 689 (1992), this Court reined in the "domestic relations exception." Earlier, in *Markham* v. *Allen*, 326 U. S. 490 (1946), the Court endeavored similarly to curtail the "probate exception."

Nevertheless, the Ninth Circuit in the instant case read the probate exception broadly to exclude from the federal courts' adjudicatory authority "not only direct challenges to a will or trust, but also questions which would ordinarily be decided by a probate court in determining the validity of the decedent's estate planning instrument." 392 F. 3d 1118, 1133 (2004). The Court of Appeals further held that a State's vesting of exclusive jurisdiction over probate matters in a special court strips federal courts of jurisdiction to entertain any "probate related matter," including claims respecting "tax liability, debt, gift, [or] tort." *Id.*, at 1136. We hold that the Ninth Circuit had no warrant from Congress, or from decisions of this Court, for its sweeping extension of the probate exception.

I

Petitioner, Vickie Lynn Marshall (Vickie), also known as Anna Nicole Smith, is the surviving widow of J. Howard Marshall II (J. Howard). Vickie and J. Howard met in October 1991. After a courtship lasting more than two years, they were married on June 27, 1994. J. Howard died on August 4, 1995. Although he lavished gifts and significant sums of money on Vickie during their courtship and marriage, J. Howard did not include anything for Vickie in his will. According to Vickie, J. Howard intended to provide for her financial security through a gift in the form of a "catch-all" trust.

Respondent, E. Pierce Marshall (Pierce), one of J. Howard's sons, was the ultimate beneficiary of J. Howard's estate plan, which consisted of a living trust and a "pourover" will. Under the terms of the will, all of J. Howard's assets not already included in the trust were to be transferred to the trust upon his death.

Competing claims regarding J. Howard's fortune ignited proceedings in both state and federal courts. In January 1996, while J. Howard's estate was subject to ongoing proceedings in Probate Court in Harris County, Texas, Vickie filed for bankruptcy under Chapter 11 of the Bankruptcy Code, 11 U. S. C. §1101 *et seq.*, in the United States Bankruptcy Court for the Central District of California. See 275 B. R. 5, 8 (CD Cal. 2002). In June 1996, Pierce filed a proof of claim in the federal bankruptcy proceeding, *id.*, at 9; see 11 U. S. C. §501, alleging that Vickie had defamed him when, shortly after J. Howard's death, lawyers representing Vickie told members of the press that Pierce had engaged in forgery, fraud, and overreaching to gain control of his father's assets. 275 B. R., at 9. Pierce sought a declaration that the debt he asserted in that claim was not dischargeable in bankruptcy. *Ibid.*[1] Vickie answered, asserting truth as a defense. She also filed counterclaims, among them a claim that Pierce had tortiously interfered with a gift she expected. *Ibid.*; see App. 23–25. Vickie alleged that Pierce prevented the transfer of his father's intended gift to her by, among other things: effectively imprisoning J. Howard against his wishes; surrounding him with hired guards for the purpose of preventing personal contact between him and Vickie; making misrepresentations to J. Howard; and transferring property against J. Howard's expressed wishes. *Id.*, at 24.

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[1]Among debts not dischargeable in bankruptcy, see 11 U. S. C. §523(a), are those arising from "willful and malicious injury by the debtor." §523(a)(6).

Vickie's tortious interference counterclaim turned her objection to Pierce's claim into an adversary proceeding. *Id.*, at 39; see Fed. Rule Bkrtcy. Proc. 3007. In that proceeding, the Bankruptcy Court granted summary judgment in favor of Vickie on Pierce's claim and, after a trial on the merits, entered judgment for Vickie on her tortious interference counterclaim. See 253 B. R. 550, 558–559 (2000). The Bankruptcy Court also held that both Vickie's objection to Pierce's claim and Vickie's counterclaim qualified as "core proceedings" under 28 U. S. C. §157, which meant that the court had authority to enter a final judgment disposing of those claims. See 257 B. R. 35, 39–40 (2000). The court awarded Vickie compensatory damages of more than $449 million—less whatever she recovered in the ongoing probate action in Texas—as well as $25 million in punitive damages. *Id.*, at 40.

Pierce filed a post-trial motion to dismiss for lack of subject-matter jurisdiction, asserting that Vickie's tortious interference claim could be tried only in the Texas probate proceedings. *Id.*, at 36. The Bankruptcy Court held that "the 'probate exception' argument was waived" because it was not timely raised. *Id.*, at 39. Relying on this Court's decision in *Markham*, the court observed that a federal court has jurisdiction to "adjudicate rights in probate property, so long as its final judgment does not undertake to interfere with the state court's possession of the property." 257 B. R., at 38 (citing *Markham*, 326 U. S., at 494).

Meanwhile, in the Texas Probate Court, Pierce sought a declaration that the living trust and his father's will were valid. 392 F. 3d, at 1124–1125. Vickie, in turn, challenged the validity of the will and filed a tortious interference claim against Pierce, *ibid.*, but voluntarily dismissed both claims once the Bankruptcy Court entered its judgment, *id.*, at 1128. Following a jury trial, the Probate Court declared the living trust and J. Howard's will valid. *Id.*, at 1129.

Back in the federal forum, Pierce sought district-court review of the Bankruptcy Court's judgment. While rejecting the Bankruptcy Court's determination that Pierce had forfeited any argument based on the probate exception, the District Court held that the exception did not reach Vickie's claim. 264 B. R. 609, 619–625 (CD Cal. 2001). The Bankruptcy Court "did not assert jurisdiction generally over the probate proceedings . . . or take control over [the] estate's assets," the District Court observed, *id.*, at 621, "[t]hus, the probate exception would bar federal jurisdiction over Vickie's counterclaim only if such jurisdiction would 'interfere' with the probate proceedings," *ibid.* (quoting *Markham*, 326 U. S., at 494). Federal jurisdiction would not "interfere" with the probate proceedings, the District Court concluded, because: (1) success on Vickie's counterclaim did not necessitate any declaration that J. Howard's will was invalid, 264 B. R., at 621; and (2) under Texas law, probate courts do not have exclusive jurisdiction to entertain claims of the kind asserted in Vickie's counterclaim, *id.*, at 622–625.

The District Court also held that Vickie's claim did not qualify as a "core proceedin[g] arising under title 11, or arising in a case under title 11." 28 U. S. C. §157(b)(1); see 264 B. R., at 625–632. A bankruptcy court may exercise plenary power only over "core proceedings." See §157(b)–(c).[2] In non-core matters, a bankruptcy court may not

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[2] "Core proceedings include, but are not limited to—

"(A) matters concerning the administration of the estate;

"(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

"(C) counterclaims by the estate against persons filing claims against the estate;

"(D) orders in respect to obtaining credit;

enter final judgment; it has authority to issue only proposed findings of fact and conclusions of law, which are reviewed *de novo* by the district court. See §157(c)(1). Accordingly, the District Court treated the Bankruptcy Court's judgment as "proposed[,] rather than final," and undertook a "comprehensive, complete, and independent review of" the Bankruptcy Court's determinations. 264 B. R., at 633.

Adopting and supplementing the Bankruptcy Court's findings, the District Court determined that Pierce had tortiously interfered with Vickie's expectancy. Specifically, the District Court found that J. Howard directed his lawyers to prepare an *inter vivos* trust for Vickie consisting of half the appreciation of his assets from the date of their marriage. See 275 B. R., at 25–30, 51–53. It further found that Pierce conspired to suppress or destroy the trust instrument and to strip J. Howard of his assets by

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"(E) orders to turn over property of the estate;

"(F) proceedings to determine, avoid, or recover preferences;

"(G) motions to terminate, annul, or modify the automatic stay;

"(H) proceedings to determine, avoid, or recover fraudulent conveyances;

"(I) determinations as to the dischargeability of particular debts;

"(J) objections to discharges;

"(K) determinations of the validity, extent, or priority of liens;

"(L) confirmations of plans;

"(M) orders approving the use or lease of property, including the use of cash collateral;

"(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate;

"(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims; and

"(P) recognition of foreign proceedings and other matters under chapter 15 of title 11." 28 U. S. C. A. §157(b)(2) (1993 ed. and July 2005 Supp.).

backdating, altering, and otherwise falsifying documents, arranging for surveillance of J. Howard and Vickie, and presenting documents to J. Howard under false pretenses. See *id.*, at 36–50, 57–58; see also 253 B. R., at 554–556, 559–560. Based on these findings, the District Court awarded Vickie some $44.3 million in compensatory damages. 275 B. R., at 53–57. In addition, finding "overwhelming" evidence of Pierce's "willfulness, maliciousness, and fraud," the District Court awarded an equal amount in punitive damages. *Id.*, at 57–58.

The Court of Appeals for the Ninth Circuit reversed. The appeals court recognized that Vickie's claim "does not involve the administration of an estate, the probate of a will, or any other purely probate matter." 392 F. 3d, at 1133. Nevertheless, the court held that the probate exception bars federal jurisdiction in this case. In the Ninth Circuit's view, a claim falls within the probate exception if it raises "questions which would ordinarily be decided by a probate court in determining the validity of the decedent's estate planning instrument," whether those questions involve "fraud, undue influence[, or] tortious interference with the testator's intent." *Ibid.*

The Ninth Circuit was also of the view that state-court delineation of a probate court's exclusive adjudicatory authority could control federal subject-matter jurisdiction. In this regard, the Court of Appeals stated: "Where a state has relegated jurisdiction over probate matters to a special court and [the] state's trial courts of general jurisdiction do not have jurisdiction to hear probate matters, then federal courts also lack jurisdiction over probate matters." *Id.*, at 1136. Noting that "[t]he [P]robate [C]ourt ruled it had exclusive jurisdiction over all of Vickie['s] claims," the Ninth Circuit held that "ruling . . . binding on the United States [D]istrict [C]ourt." *Ibid.* (citing *Durfee* v. *Duke*, 375 U. S. 106, 115–116 (1963)).

We granted certiorari, 545 U. S. ___ (2005), to resolve the apparent confusion among federal courts concerning the scope of the probate exception. Satisfied that the instant case does not fall within the ambit of the narrow exception recognized by our decisions, we reverse the Ninth Circuit's judgment.

II

In *Ankenbrandt* v. *Richards*, 504 U. S. 689 (1992), we addressed both the derivation and the limits of the "domestic relations exception" to the exercise of federal jurisdiction. Carol Ankenbrandt, a citizen of Missouri, brought suit in Federal District Court on behalf of her daughters, naming as defendants their father (Ankenbrandt's former husband) and his female companion, both citizens of Louisiana. *Id.*, at 691. Ankenbrandt's complaint sought damages for the defendants' alleged sexual and physical abuse of the children. *Ibid.* Federal jurisdiction was predicated on diversity of citizenship. *Ibid.* (citing 28 U. S. C. §1332). The District Court dismissed the case for lack of subject-matter jurisdiction, holding that Ankenbrandt's suit fell within "the 'domestic relations' exception to diversity jurisdiction." 504 U. S., at 692. The Court of Appeals agreed and affirmed. *Ibid.* We reversed the Court of Appeals' judgment. *Id.*, at 706–707.

Holding that the District Court improperly refrained from exercising jurisdiction over Ankenbrandt's tort claim, *id.*, at 704, we traced explanation of the current domestic relations exception to *Barber* v. *Barber*, 21 How. 582 (1859). See *Ankenbrandt*, 504 U. S., at 693–695. In *Barber*, the Court upheld federal-court authority, in a diversity case, to enforce an alimony award decreed by a state court. In dicta, however, the *Barber* Court announced—without citation or discussion—that federal courts lack jurisdiction over suits for divorce or the allowance of ali-

mony. 21 How., at 584–589; see *Ankenbrandt*, 504 U. S., at 693–695.

Finding no Article III impediment to federal-court jurisdiction in domestic relations cases, *id.*, at 695–697, the Court in *Ankenbrandt* anchored the exception in Congress' original provision for diversity jurisdiction, *id.*, at 698–701. Beginning at the beginning, the Court recalled:

> "The Judiciary Act of 1789 provided that 'the circuit courts shall have original cognizance, concurrent with the courts of the several States, of *all suits of a civil nature at common law or in equity, where the matter in dispute exceeds*, exclusive of costs, the sum or value of *five hundred dollars*, and . . . an alien is a party, or the suit is *between a citizen of the State where the suit is brought, and a citizen of another State*.'" *Id.*, at 698 (quoting Act of Sept. 24, 1789, §11, 1 Stat. 78; emphasis added in *Ankenbrandt*).

The defining phrase, "all suits of a civil nature at common law or in equity," the Court stressed, remained in successive statutory provisions for diversity jurisdiction until 1948, when Congress adopted the more economical phrase, "all civil actions." 504 U. S., at 698; 1948 Judicial Code and Judiciary Act, 62 Stat. 930, 28 U. S. C. §1332.

The *Barber* majority, we acknowledged in *Ankenbrandt*, did not expressly tie its announcement of a domestic relations exception to the text of the diversity statute. 504 U. S., at 698. But the dissenters in that case made the connection. They stated that English courts of chancery lacked authority to issue divorce and alimony decrees. Because "the jurisdiction of the courts of the United States in chancery is bounded by that of the chancery in England," *Barber*, 21 How., at 605 (opinion of Daniel, J.), the dissenters reasoned, our federal courts similarly lack authority to decree divorces or award alimony, *ibid.* Such relief, in other words, would not fall within the diversity

statute's original grant of jurisdiction over "all suits of a civil nature at common law or in equity." We concluded in *Ankenbrandt* that "it may be inferred fairly that the jurisdictional limitation recognized by the *[Barber]* Court rested on th[e] statutory basis" indicated by the dissenters in that case. 504 U. S., at 699.

We were "content" in *Ankenbrandt* "to rest our conclusion that a domestic relations exception exists as a matter of statutory construction not on the accuracy of the historical justifications on which [the exception] was seemingly based." *Id.*, at 700. "[R]ather," we relied on "Congress' apparent acceptance of this construction of the diversity jurisdiction provisions in the years prior to 1948, when the statute limited jurisdiction to 'suits of a civil nature at common law or in equity.'" *Ibid.* (quoting 1 Stat. 78). We further determined that Congress did not intend to terminate the exception in 1948 when it "replace[d] the law/equity distinction with the phrase 'all civil actions.'" 504 U. S., at 700. Absent contrary indications, we presumed that Congress meant to leave undisturbed "the Court's nearly century-long interpretation" of the diversity statute "to contain an exception for certain domestic relations matters." *Ibid.*

We nevertheless emphasized in *Ankenbrandt* that the exception covers only "a narrow range of domestic relations issues." *Id.*, at 701. The *Barber* Court itself, we reminded, "sanctioned the exercise of federal jurisdiction over the enforcement of an alimony decree that had been properly obtained in a state court of competent jurisdiction." 504 U. S., at 702. Noting that some lower federal courts had applied the domestic relations exception "well beyond the circumscribed situations posed by *Barber* and its progeny," *id.*, at 701, we clarified that only "divorce, alimony, and child custody decrees" remain outside federal jurisdictional bounds, *id.*, at 703, 704. While recognizing the "special proficiency developed by state tribunals . . . in

handling issues that arise in the granting of [divorce, alimony, and child custody] decrees," *id.*, at 704, we viewed federal courts as equally equipped to deal with complaints alleging the commission of torts, *ibid.*

III

Federal jurisdiction in this case is premised on 28 U. S. C. §1334, the statute vesting in federal district courts jurisdiction in bankruptcy cases and related proceedings. Decisions of this Court have recognized a "probate exception," kin to the domestic relations exception, to otherwise proper federal jurisdiction. See *Markham* v. *Allen*, 326 U. S., at 494; see also *Sutton* v. *English*, 246 U. S. 199 (1918); *Waterman* v. *Canal-Louisiana Bank & Trust Co.*, 215 U. S. 33 (1909). Like the domestic relations exception, the probate exception has been linked to language contained in the Judiciary Act of 1789.

Markham, the Court's most recent and pathmarking pronouncement on the probate exception, stated that "the equity jurisdiction conferred by the Judiciary Act of 1789 . . . , which is that of the English Court of Chancery in 1789, did not extend to probate matters." 326 U. S., at 494. See generally Nicolas, Fighting the Probate Mafia: A Dissection of the Probate Exception to Federal Jurisdiction, 74 S. Cal. L. Rev. 1479 (2001). As in *Ankenbrandt*, so in this case, "[w]e have no occasion . . . to join the historical debate" over the scope of English chancery jurisdiction in 1789, 504 U. S., at 699, for Vickie Marshall's claim falls far outside the bounds of the probate exception described in *Markham*. We therefore need not consider in this case whether there exists any uncodified probate exception to federal bankruptcy jurisdiction under §1334.[3]

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[3]We note that the broad grant of jurisdiction conferred by §1334(b) is subject to a mandatory abstention provision applicable to certain state-law claims. Section 1334(c)(2) provides:

In *Markham*, the plaintiff Alien Property Custodian[4] commenced suit in Federal District Court against an executor and resident heirs to determine the Custodian's asserted rights regarding a decedent's estate. 326 U. S., at 491–492. Jurisdiction was predicated on §24(1) of the Judicial Code, now 28 U. S. C. §1345, which provides for federal jurisdiction over suits brought by an officer of the United States. At the time the federal suit commenced, the estate was undergoing probate administration in a state court. The Custodian had issued an order vesting in himself all right, title, and interest of German legatees. He sought and gained in the District Court a judgment

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"Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction."

That provision is, in turn, qualified: "Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2)." §157(b)(4). Because the Bankruptcy Court rejected Pierce's motion for mandatory abstention as untimely, 257 B. R. 35, 39 (CD Cal. 2000), we need not consider whether these provisions might have required abstention upon a timely motion.

[4]Section 6 of the Trading with the Enemy Act, 40 Stat. 415, 50 U. S. C. App., authorizes the President to appoint an official known as the "alien property custodian," who is responsible for "receiv[ing,] . . . hold[ing], administer[ing], and account[ing] for" "all money and property in the United States due or belonging to an enemy, or ally of enemy . . . ." The Act was originally enacted during World War I "to permit, under careful safeguards and restrictions, certain kinds of business to be carried on" among warring nations, and to "provid[e] for the care and administration of the property and property rights of enemies and their allies in this country pending the war." *Markham* v. *Cabell*, 326 U. S. 404, 414, n. 1 (1945) (Burton, J., concurring) (quoting S. Rep. No. 113, 65th Cong., 1st Sess., p. 1 (1917)).

determining that the resident heirs had no interest in the estate, and that the Custodian, substituting himself for the German legatees, was entitled to the entire net estate, including specified real estate passing under the will.

Reversing the Ninth Circuit, which had ordered the case dismissed for want of federal subject-matter jurisdiction, this Court held that federal jurisdiction was properly invoked. The Court first stated:

> "It is true that a federal court has no jurisdiction to probate a will or administer an estate . . . . But it has been established by a long series of decisions of this Court that federal courts of equity have jurisdiction to entertain suits 'in favor of creditors, legatees and heirs' and other claimants against a decedent's estate 'to establish their claims' so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court." 326 U. S., at 494 (quoting *Waterman*, 215 U. S., at 43).

Next, the Court described a probate exception of distinctly limited scope:

> "[W]hile a federal court may not exercise its jurisdiction to disturb or affect the possession of property in the custody of a state court, . . . it may exercise its jurisdiction to adjudicate rights in such property where the final judgment does not undertake to interfere with the state court's possession save to the extent that the state court is bound by the judgment to recognize the right adjudicated by the federal court." 326 U. S., at 494.

The first of the above-quoted passages from *Markham* is not a model of clear statement. The Court observed that federal courts have jurisdiction to entertain suits to determine the rights of creditors, legatees, heirs, and other

claimants against a decedent's estate, "so long as the federal court does not *interfere with the probate proceedings*." *Ibid.* (emphasis added). Lower federal courts have puzzled over the meaning of the words "interfere with the probate proceedings," and some have read those words to block federal jurisdiction over a range of matters well beyond probate of a will or administration of a decedent's estate. See, *e.g.*, *Mangieri* v. *Mangieri*, 226 F. 3d 1, 2–3 (CA1 2000) (breach of fiduciary duty by executor); *Golden ex rel. Golden* v. *Golden*, 382 F. 3d 348, 360–362 (CA3 2004) (same); *Lepard* v. *NBD Bank*, 384 F. 3d 232–237 (CA6 2004) (breach of fiduciary duty by trustee); *Storm* v. *Storm*, 328 F. 3d 941, 943–945 (CA7 2003) (probate exception bars claim that plaintiff's father tortiously interfered with plaintiff's inheritance by persuading trust grantor to amend irrevocable *inter vivos* trust); *Rienhardt* v. *Kelly*, 164 F. 3d 1296, 1300–1301 (CA10 1999) (probate exception bars claim that defendants exerted undue influence on testator and thereby tortiously interfered with plaintiff's expected inheritance).

We read *Markham*'s enigmatic words, in sync with the second above-quoted passage, to proscribe "disturb[ing] or affect[ing] the possession of property in the custody of a state court." 326 U. S., at 494. True, that reading renders the first-quoted passage in part redundant, but redundancy in this context, we do not doubt, is preferable to incoherence. In short, we comprehend the "interference" language in *Markham* as essentially a reiteration of the general principle that, when one court is exercising *in rem* jurisdiction over a *res*, a second court will not assume *in rem* jurisdiction over the same *res*. See, *e.g.*, *Penn General Casualty Co.* v. *Pennsylvania ex rel. Schnader*, 294 U. S. 189, 195–196 (1935); *Waterman*, 215 U. S., at 45–46. Thus, the probate exception reserves to state probate courts the probate or annulment of a will and the administration of a decedent's estate; it also precludes federal

courts from endeavoring to dispose of property that is in the custody of a state probate court. But it does not bar federal courts from adjudicating matters outside those confines and otherwise within federal jurisdiction.

A

As the Court of Appeals correctly observed, Vickie's claim does not "involve the administration of an estate, the probate of a will, or any other purely probate matter." 392 F. 3d, at 1133. Provoked by Pierce's claim in the bankruptcy proceedings, Vickie's claim, like Carol Ankenbrandt's, alleges a widely recognized tort. See *King* v. *Acker*, 725 S. W. 2d 750, 754 (Tex. App. 1987); Restatement (Second) of Torts §774B (1977) ("One who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that [s]he would otherwise have received is subject to liability to the other for loss of the inheritance or gift."). Vickie seeks an *in personam* judgment against Pierce, not the probate or annulment of a will. Cf. *Sutton*, 246 U. S., at 208 (suit to annul a will found "supplemental to the proceedings for probate of the will" and therefore not cognizable in federal court). Nor does she seek to reach a *res* in the custody of a state court. See *Markham*, 326 U. S., at 494.

Furthermore, no "sound policy considerations" militate in favor of extending the probate exception to cover the case at hand. Cf. *Ankenbrandt*, 504 U. S., at 703. Trial courts, both federal and state, often address conduct of the kind Vickie alleges. State probate courts possess no "special proficiency . . . in handling [such] issues." Cf. *id.*, at 704.

B

The Court of Appeals advanced an alternate basis for its conclusion that the federal courts lack jurisdiction over

Vickie's claim. Noting that the Texas Probate Court "ruled it had exclusive jurisdiction over all of Vickie Lynn Marshall's claims against E. Pierce Marshall," the Ninth Circuit held that "ruling . . . binding on the United States [D]istrict [C]ourt." 392 F. 3d, at 1136. We reject that determination.

Texas courts have recognized a state-law tort action for interference with an expected inheritance or gift, modeled on the Restatement formulation. See *King*, 725 S. W. 2d, at 754; *Brandes* v. *Rice Trust, Inc.*, 966 S. W. 2d 144, 146–147 (Tex. App. 1998).[5] It is clear, under *Erie R. Co.* v.

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[5]Texas appellate courts have on occasion held claims of tortious interference with an expected inheritance "barred" by a prior probate court judgment, apparently applying ordinary principles of preclusion. See, *e.g.*, *Thompson* v. *Deloitte & Touche*, 902 S. W. 2d 13, 16 (Tex. App. 1995) (final probate court judgment bars claim of tortious interference with inheritance expectancy because probate court "necessarily found that [the decedent] signed the will with testamentary capacity, and that it reflected his intent, was not the result of coercion or undue influence, and was valid"); *Neill* v. *Yett*, 746 S. W. 2d 32, 35–36 (Tex. App. 1988) (complaint alleging fraud and tortious interference with inheritance expectancy, filed more than two years after will was admitted to probate, was barred by both the statute of limitations and the final probate judgment, and failed to state the elements of the claim). Neither *Thompson* nor *Neill* questions the Texas trial courts' subject-matter jurisdiction over the claims in question.

Pierce maintains that *Thompson*, *Neill*, and other Texas decisions support his contention that preclusion principles bar Vickie's claim. See Brief for Respondent 36–38. Vickie argues to the contrary. See Brief for Petitioner 42 n. 30 (urging that preclusion does not apply because (1) Vickie's claim was not litigated to final judgment in the Texas probate proceedings; (2) having presented her claim in the Bankruptcy Court years before she joined the Texas will contest, Vickie was not obliged to present her claim in the Texas proceedings; (3) the Bankruptcy Court's judgment preceded the Probate Court judgment; and (4) the Texas Probate Court did not have before it important evidence). See also Tex. Rule Civ. Proc. 97; *Ingersoll-Rand Co.* v. *Valero Energy Corp.*, 997 S. W. 2d 203, 206–207 (Tex. 1999). The matter of preclusion remains open for consideration on remand. See *infra*, at 18.

Tompkins, 304 U. S. 64 (1938), that Texas law governs the substantive elements of Vickie's tortious interference claim. It is also clear, however, that Texas may not reserve to its probate courts the exclusive right to adjudicate a transitory tort. We have long recognized that "a State cannot create a transitory cause of action and at the same time destroy the right to sue on that transitory cause of action in any court having jurisdiction." *Tennessee Coal, Iron & R. Co.* v. *George*, 233 U. S. 354, 360 (1914). Jurisdiction is determined "by the law of the court's creation and cannot be defeated by the extraterritorial operation of a [state] statute . . . , even though it created the right of action." *Ibid.* Directly on point, we have held that the jurisdiction of the federal courts, "having existed from the beginning of the Federal government, [can] not be impaired by subsequent state legislation creating courts of probate." *McClellan* v. *Carland*, 217 U. S. 268, 281 (1910) (upholding federal jurisdiction over action by heirs of decedent, who died intestate, to determine their rights in the estate (citing *Waterman*, 215 U. S. 33)).

Our decision in *Durfee* v. *Duke*, 375 U. S. 106 (1963), relied upon by the Ninth Circuit, 392 F. 3d, at 1136, is not to the contrary. *Durfee* stands only for the proposition that a state court's final judgment determining *its own* jurisdiction ordinarily qualifies for full faith and credit, so long as the jurisdictional issue was fully and fairly litigated in the court that rendered the judgment. See 375 U. S., at 111, 115. At issue here, however, is not the Texas Probate Court's jurisdiction, but the federal courts' jurisdiction to entertain Vickie's tortious interference claim. Under our federal system, Texas cannot render its probate courts exclusively competent to entertain a claim of that genre. We therefore hold that the District Court properly

asserted jurisdiction over Vickie's counterclaim against Pierce.

IV

After determining that Vickie's claim was not a "core proceeding," the District Court reviewed the case *de novo* and entered its final judgment on March 7, 2002. 275 B. R., at 5–8. The Texas Probate Court's judgment became final on February 11, 2002, nearly one month earlier. App. to Pet. for Cert. 41. The Court of Appeals considered only the issue of federal subject-matter jurisdiction. It did not address the question whether Vickie's claim was "core"; nor did it address Pierce's arguments concerning claim and issue preclusion. 392 F. 3d, at 1137. These issues remain open for consideration on remand.

* * *

For the reasons stated, the judgment of the Court of Appeals for the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 04–1544

VICKIE LYNN MARSHALL, PETITIONER *v.* E. PIERCE MARSHALL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[May 1, 2006]

JUSTICE STEVENS, concurring in part and concurring in the judgment.

The administration of decedents' estates typically is governed by rules of state law and conducted by state probate courts. Occasionally, however, disputes between interested parties arise, either in the probate proceeding itself or elsewhere, that qualify as cases or controversies that federal courts have jurisdiction to decide. See, *e.g.*, *Reed* v. *Reed*, 404 U. S. 71 (1971). In her opinion for the Court, JUSTICE GINSBURG has cogently explained why this is such a case. I write separately to explain why I do not believe there is any "probate exception" that ousts a federal court of jurisdiction it otherwise possesses.

The familiar aphorism that hard cases make bad law should extend to easy cases as well. *Markham* v. *Allen*, 326 U. S. 490 (1946), like this case, was an easy case. In *Markham*, as here, it was unnecessary to question the historical or logical underpinnings of the probate exception to federal jurisdiction because, whatever the scope of the supposed exception, it did not extend to the case at hand. But *Markham*'s obiter dicta—dicta that the Court now describes as redundant if not incoherent, *ante*, at 14—generated both confusion and abdication of the obligation Chief Justice Marshall so famously articulated, see *Cohens* v. *Virginia*, 6 Wheat. 264, 404 (1821); see also

ante, at 1. While the Court today rightly abandons much of that dicta, I would go further.

The Court is content to adopt the approach it followed in *Ankenbrandt* v. *Richards*, 504 U. S. 689 (1992), and to accept as foundation for the probate exception *Markham*'s bald assertion that the English High Court of Chancery's jurisdiction did not "extend to probate matters" in 1789. 326 U. S., at 495; see *ante*, at 11. I would not accept that premise. Not only had the theory *Markham* espoused been only sporadically and tentatively cited as justification for the exception,[1] but the most comprehensive article on the subject has persuasively demonstrated that *Markham*'s assertion is "an exercise in mythography."[2]

Markham's theory apparently is the source of the Court's reformulated exception, which "reserves to state probate courts the probate or annulment of a will and the administration of a decedent's estate." *Ante*, at 14. Although undoubtedly narrower in scope than *Markham*'s ill-considered description of the probate carve-out, this description also sweeps too broadly. For the Court has correctly upheld the exercise of federal jurisdiction over actions involving the annulment of wills and the admini-

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[1] Notably, Justice Joseph Bradley, a strong proponent of the theory that federal courts sitting in equity cannot exercise jurisdiction over probate matters because in England in 1789 such jurisdiction belonged to the ecclesiastical courts, see *Case of Broderick's Will*, 21 Wall. 503 (1875), *Gaines* v. *Fuentes*, 92 U. S. 10, 24-25 (1876) (dissenting opinion), urged that "even in matters savoring of [e]cclesiastical process, after an issue has been formed between definite parties," the controversy should be heard by a federal court. See *Rosenbaum* v. *Bauer*, 120 U. S. 450, 460-461 (1887) (dissenting opinion) (citing *Gaines*, 92 U. S., at 17, and *Hess* v. *Reynolds*, 113 U. S. 73 (1885)).

[2] Winkler, The Probate Jurisdiction of the Federal Courts, 14 Probate L. J. 77, 126 (1997); see *ante*, at 1–2 (acknowledging Winkler's analysis). Winkler also observes, citing Charles Dickens' Bleak House (1853), that *Markham*'s "suggestion that the High Court of Chancery had lacked jurisdiction to 'administer an estate' was preposterous." 14 Probate L. J., at 125, and n. 256.

stration of decedents' estates. In *Gaines* v. *Fuentes*, 92 U. S. 10 (1876), for example, the Court held that a defendant in an action to annul a will should be permitted to remove the case to federal court. In so doing, it explained:

> "[W]henever a controversy in a suit . . . arises respecting the validity or construction of a will, or the enforcement of a decree admitting it to probate, there is no more reason why the Federal courts should not take jurisdiction of the case than there is that they should not take jurisdiction of any other controversy between the parties." *Id.*, at 22.

Likewise, in *Payne* v. *Hook*, 7 Wall. 425 (1869), the Court explained that it was "well settled that a court of chancery, as an incident to its power to enforce trusts, and make those holding a fiduciary relation account, has jurisdiction to compel executors and administrators to account and distribute the assets in their hands." *Id.*, at 431. (In that same case, a federal court later appointed a Special Master to administer the estate. This Court upheld some of the Master's determinations and rejected others. See *Hook* v. *Payne*, 14 Wall. 252, 255 (1872).)

To be sure, there are cases that support limitations on federal courts' jurisdiction over the probate and annulment of wills and the administration of decedents' estates. But careful examination reveals that at least most of the limitations so recognized stem not from some *sui generis* exception, but rather from generally applicable jurisdictional rules. Cf. *Ellis* v. *Davis*, 109 U. S. 485, 497 (1883) ("Jurisdiction as to wills, and their probate as such, is neither included in nor excepted out of the grant of judicial power to the courts of the United States"). Some of those rules, like the rule that diversity jurisdiction will not attach absent an *inter partes* controversy, plainly are still relevant today. See, *e.g.*, *Waterman* v. *Canal-Louisiana Bank & Trust Co.*, 215 U. S. 33, 44–45 (1909); see also *id.*,

at 46 (reaffirming the *in gremio legis* principle). Others, like the rule that a bill in equity will lie only where there is no adequate remedy elsewhere, have less straightforward application in the wake of 20th-century jurisdictional developments. See, *e.g.*, *Case of Broderick's Will*, 21 Wall. 503, 510–512 (1875); *Ellis*, 109 U. S., at 503 (denying relief where plaintiff had "a plain, adequate, and complete remedy at law"); see also Winkler, *supra*, n.2, at 112–113. Whatever the continuing viability of these individual rules, together they are more than adequate to the task of cabining federal courts' jurisdiction. They require no helping hand from the so-called probate exception.

Rather than preserving whatever vitality that the "exception" has retained as a result of the *Markham* dicta, I would provide the creature with a decent burial in a grave adjacent to the resting place of the *Rooker-Feldman* doctrine. See *Lance* v. *Dennis*, 546 U. S. ___, ___ (2006) (STEVENS, J., dissenting) (slip op., at 2–3).